# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 190[redacted]

No. [redacted]2

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LATHROP, SHEA & HENWOOD COMPANY, PLAINTIFF IN ERROR,

vs.

INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

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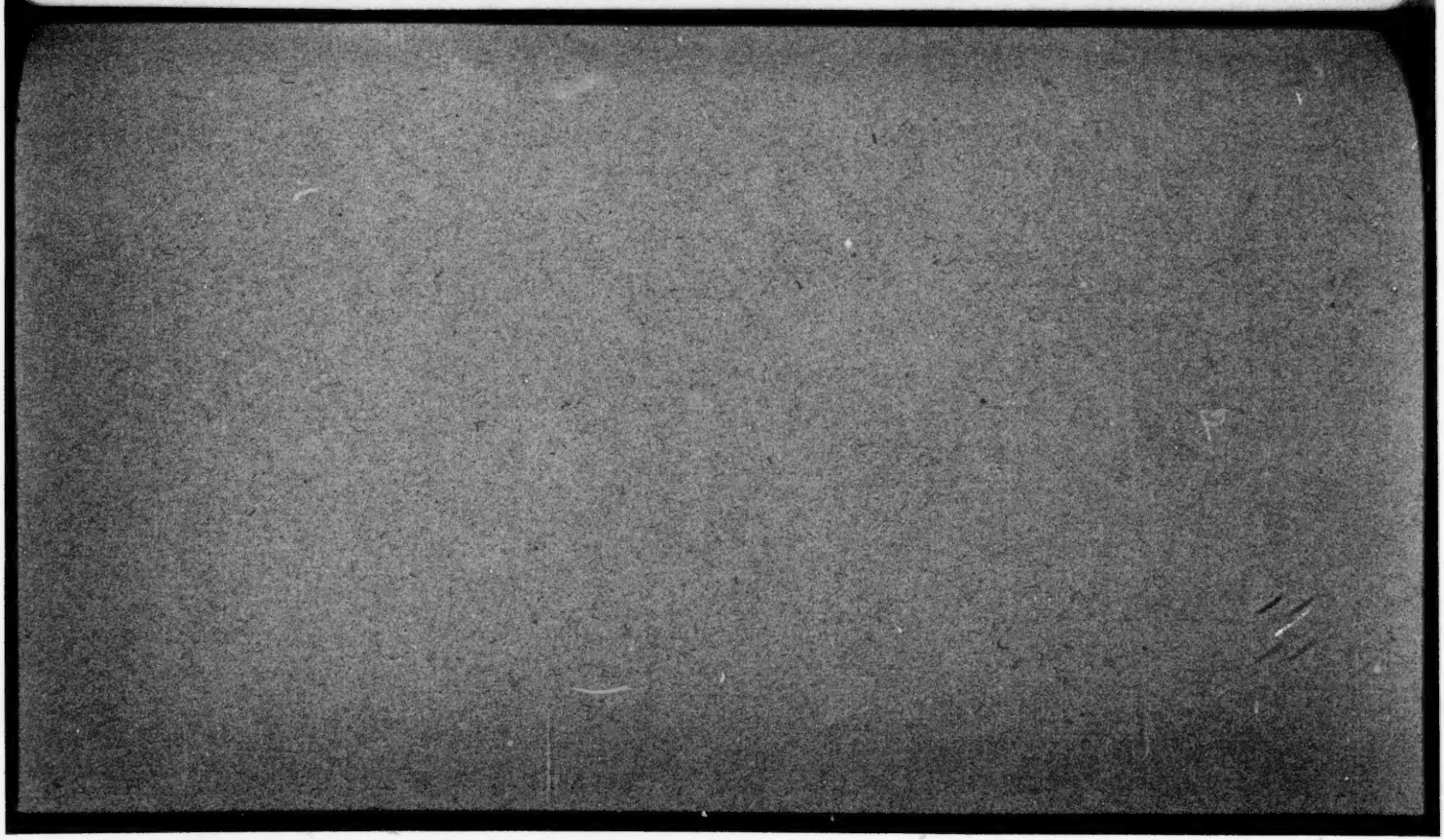
FILED MAY 20, 1907.

(20,747.)



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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Statement | 1 | 1 |
| Record on removal from State court | 2 | 1 |
| Judgment affirming judgment dismissing complaint against Pittsburg, Shawmut and Northern Ry. Co. | 2 | 1 |
| Bond on removal | 3 | 2 |
| Petition for removal | 6 | 4 |
| Clerk's certificate | 9 | 6 |
| Judgment-roll, Lathrop, Shea & Henwood Co. *vs.* Interior Construction & Improvement Co. | 10 | 6 |
| Proof of service of summons and complaint | 10 | 6 |
| Proof of service of summons and complaint | 11 | 7 |
| Proof of service of summons and complaint | 12 | 7 |
| Summons | 13 | 8 |
| Complaint | 14 | 8 |
| Affidavit of default of Interior Construction and Improvement Co. | 29 | 17 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1908.

| | Original. | Print. |
|---|---|---|
| Order of reference to take proofs of cause of action | 33 | 19 |
| Referee's report | 34 | 19 |
| Referee's oath | 36 | 21 |
| Proceedings before referee | 36 | 21 |
| Testimony of John J. Shea | 37 | 21 |
| Order confirming referee's report | 50 | 31 |
| Judgment against Interior Construction and Improvement Co. | 52 | 32 |
| Clerk's certificate | 53 | 32 |
| Judgment dismissing complaint against Pittsburg, Shawmut and Northern Ry. Co. | 54 | 33 |
| Clerk's certificate | 55 | 33 |
| Order to show cause | 56 | 34 |
| Affidavit of Frederick H. Mollenhauer | 58 | 35 |
| Exhibit A—Revocation of designation | 60 | 36 |
| B—Notice of revocation | 61 | 36 |
| Affidavit of C. Walter Artz | 62 | 37 |
| Henry S. Hastings | 65 | 38 |
| Frederic H. Ridgway | 67 | 40 |
| Alexander Munro | 70 | 41 |
| Edward Donnelly | 71 | 42 |
| C. Walter Artz of October 31, 1905 | 73 | 43 |
| C. Walter Artz of November 23, 1905 | 77 | 45 |
| Order to show cause why service of summons should not be set aside and judgment vacated | 80 | 47 |
| Affidavit of C. Walter Artz of December 4, 1906 | 81 | 48 |
| J. H. Metcalf of November 1, 1905 | 84 | 49 |
| J. H. Metcalf of February 11, 1905 | 90 | 52 |
| J. H. Metcalf of November 8, 1905 | 97 | 57 |
| J. H. Metcalf of November 16, 1905 | 102 | 60 |
| J. H. Metcalf of December 26, 1906 | 104 | 61 |
| Papers used in State court on motion to set aside service of summons | 106 | 62 |
| Order to show cause | 107 | 62 |
| Affidavit of Frederick H. Mollenhauer | 109 | 63 |
| Exhibit A—Revocation of designation | 111 | 64 |
| B—Notice of revocation | 112 | 64 |
| Affidavit of C. Walter Artz | 113 | 65 |
| Exhibit—Summons | 116 | 66 |
| Affidavit of Robert B. Killgore | 117 | 67 |
| Exhibit A—Letter, O'Brien to Killgore, October 28, 1904 | 119 | 68 |
| B—Letter, O'Brien to Bushnell & Metcalf, November 9, 1904 | 120 | 68 |
| Affidavit of Clarence M. Bushnell | 121 | 69 |
| Robert B. Killgore | 123 | 70 |
| Frank H. Wimmell | 125 | 71 |
| Frederic H. Ridgway | 126 | 71 |
| Frank P. Byrne | 129 | 73 |
| Alexander Munro | 130 | 74 |
| Certificate of Alexander Munro | 132 | 74 |
| Affidavit of Henry S. Hastings | 133 | 75 |
| Order denying motion to set aside service of summons | 136 | 76 |
| Affidavit of no opinion | 138 | 77 |

| | Original. | Print. |
|---|---|---|
| Notice of appeal | 139 | 78 |
| Stipulation as to record | 141 | 79 |
| Opinion, Hazel, J., granting motion to set aside service of summons and vacating judgment | 142 | 79 |
| Order granting motion to set aside service of summons and vacating judgment | 152 | 84 |
| Petition for writ of error | 154 | 85 |
| Assignment of errors | 157 | 87 |
| Order allowing writ of error | 159 | 88 |
| Bond on appael | 161 | 88 |
| Certificate as to jurisdiction | 166 | 92 |
| Writ of error | 173 | 95 |
| Citation | 176 | 96 |
| Admission of service of papers on writ of error | 178 | 97 |
| Order extending time to file transcript of record | 179 | 97 |
| Clerk's certificate | 180 | 98 |

1 Supreme Court of the United States.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff in Error (Plaintiff Below),
*against*
THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendant in Error (Defendant Below).

1906.
Dec. 4. Filed record on removal from Supreme Court, Erie County.
" 27. Filed plaintiff's affidavits.
1907.
Jan. 30. Filed opinion Hazel J.
Feb. 5. Filed and entered order setting aside service of summons and vacating default judgment.
Mar. 15. Filed petition for writ of error, certificate as to jurisdiction, assignments of error, order allowing writ of error, bond writ of error and citation.
" 19. Filed admission of service by defendant's attorney of all above papers.
Apr. 11. Order granted extending time to file transcript on appeal.

2 At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, commencing on the 13th day of Nov., 1906.

Present: Honorable Peter B. McLennan, Presiding Justice.
" Honorable Alfred Spring,
" Pardon C. Williams,
" Edwin A. Nash,
" Frederick W. Kruse,
Associate Justices.

LATHROP, SHEA & HENWOOD COMPANY, Appellant,
*vs.*
THE PITTSBURGH, SHAWMUT & NORTHERN RAILROAD COMPANY, Impleaded with INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Respondents.

Lathrop Shea and Henwood Company, the plaintiff and appellant in the above entitled action, having appealed to the Appellate Division, Fourth Department, from a Judgment of the Supreme Court dismissing said plaintiff's complaint as to said defendant Railroad Company, defendant herein, with costs, and the said appeal having been argued by J. H. Metcalf, Esq., of counsel for the appellant, and by D. D. Dickson, Esq., of counsel for the respondent, and due deliberation having been had thereon,

Now, on motion of Smith and Dickson, attorneys for said defendant-respondent,

It is hereby ordered and adjudged that said judgment so appealed from be and the same hereby is affirmed, and that said defendant The Pittsburg Shawmut and Northern Railroad Company have judgment against said plaintiff Lathrop Shea and Henwood Company, for its costs herein, for the sum of One hundred sixteen
3 dollars and eighty-five cents, and have execution therefor.

Judgment Signed This 4 Day of Dec. 1906.

C. W. CHAPIN,
*Dep. Clerk.*

Endorsed: Supreme Court, Erie County. Lathrop, Shea & Henwood Company, Appellant, *vs.* The Pittsburg, Shawmut & Northern R. R. Co., Impleaded with Interior Constr. & Impr. Co., Respondent. Judgment. Smith & Dickson, Attorneys for Respondent. Office and Post Office Address, Angelica, N. Y.

Supreme Court, Erie County.

LATHROP-SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

*Bond on Removal.*

Know all men by these presents: That we, The Interior Construction & Improvement Company, principal and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 35 Wall Street, in the Borough of Manhattan, in the City of New York, surety, are held and firmly bound unto the plaintiff, The Lathrop-Shea & Henwood Company, in the sum of Five Hundred ($500.00) dollars, lawful money of the United States, to be paid to the said The Lathrop-Shea & Henwood Company its successors and assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the third of December, 1906.

Upon condition, nevertheless that whereas, the said The Interior Construction & Improvement Company has filed a petition
4 in the Supreme Court, Erie County for the removal of a certain cause therein pending between the said The Lathrop-Shea & Henwood Company, as plaintiff and the said The Interior Construction & Improvement Company, as defendant, to the Circuit Court of the United States, in and for the Western District of New York;

Now, if the said The Interior Construction & Improvement Company shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit

was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
By C. WALTER ARTZ,
*Its Attorney, Specially Appearing for Purposes of Removal Only.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*

Attest:
JAMES R. KINGSLEY,
*Attorney-in-fact.*

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company, in the City of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"Resolved, That in pursuance of Section eight hundred and eleven " of the Code of Civil Procedure of the State of New York, Henry B. " Platt, Vice-President, or George Sewell Bonner, Attorney, or Frank " H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood " and James R. Kingsley, Attorneys-in-fact of this Company, in the " State of New York, be, and each of them is, hereby authorized and " empowered to sign, execute and deliver any or all bonds or under- " takings for or on behalf of this Company, and to attach thereto " the seal of the corporation, the same to be attested by the said " George Sewell Bonner, Attorney of the Company, or by either one " of the other persons above named, as occasion may require."

5 COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney-in-fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand, and the Seal of the Company at the City of New York, this 3rd day of December, 1906.

[SEAL.] JAMES R. KINGSLEY,
*Attorney-in-fact.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 3rd day of December, in the year 1906, before me personally came Henry B. Platt to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York; that he was the Vice-President of the Fidelity and Deposit Company of Maryland, the corporation named in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it

was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley and knew him to be the attorney-in-fact of said Company; that the signature of the said James R. Kingsley subscribed to the said instrument, was in the genuine handwriting of the said James R. Kingsley and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Henry B. Platt.

[SEAL.] ERNEST L. HICKS,
*Notary Public, New York County.*

Certificate filed in Erie County.

6 Endorsed: Supreme Court, Erie County. The Lathrop-Shea & Henwood Company, Plaintiff, against The Interior Construction & Improvement Company, Defendant. Bond on Removal. Surety: Fidelity and Deposit Company of Maryland. C. Walter Artz, Attorney for petitioner appearing specially only, 52 Broadway, New York City. I approve of thw within Bond and of the sufficiency of the surety therein. Dated December 4, 1906. Chas. B. Wheeler, J. S. C.

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
Defendant.

The petition of the defendant The Interior Construction and Improvement Company appearing herein for the special and sole purpose of presenting its petition to this Court for the removal of the above entitled cause to the Circuit Court of the United States for the Western District of New York, respectfully represents and shows to this Court:

I. That this action is of a civil nature at law and that the matter in dispute exceeds exclusive of interest and costs the sum of $2,000.

II. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, as alleged in the complaint in this action, and is a resident and citizen of the said State of New York, and that your petitioner, The Interior Construction & Improvement Company is a foreign corporation, organized and existing under and by virtue of the Laws of the State of New Jersey, and a resident and citizen of said State of New Jersey.

7 III. Your petitioner further says that in the bringing of this suit, the Pittsburg, Shawmut & Northern Railroad Company, a consolidated corporation of the States of New York and Pennsylvania, and a resident and citizen of said State of New York, as far as this action is concerned, was fraudulently and improperly joined with your petitioner as a party defendant, and upon a peti-

tion for removal by your petitioner heretofore made and acted upon said cause was remanded to the State Court solely because of such fraudulent and improper joinder.

IV. That, as petitioner is informed and believes, this action was on the 26th day of December, 1905, dismissed as to said Pittsburg, Shawmut & Northern Railroad Company, and said cause became then for the first time removable, under the ruling of said Circuit Court heretofore made as aforesaid. That your petitioner thereupon appearing specially by attorney removed this cause to said Circuit Court on the ground that the action was then pending against your petitioner alone as defendant; but said Circuit Court remanded said action to this court for the reason that an appeal having been taken by said plaintiffs from the judgment of dismissal to the Appellate Division of this Court, said action was not in the opinion of said Circuit Court determined as to said Railroad Company and that until the final determination of the validity of said dismissal said Railroad Company could not be considered as no longer a party defendant and that the said second removal was premature on that account.

Your petitioner shows that said appeal has been decided by said Appellate Division and judgment entered December 4th, 1906, affirming said judgment of dismissal and that no appeal has been taken from said judgment of affirmance and that the same therefore has the effect of a final determination that the said Railroad Company is no longer in any sense a party defendant in this action.

8 V. That your petitioner herewith files a bond with good and sufficient surety for it entering in the Circuit Court of the United States, for the Western District of New York, on or before the first day of the next session of the said court, a copy of the record in said action and for paying all costs that may be awarded by said Circuit Court if the Court should hold that the said action was wrongfully or improperly removed thereto, as provided by the Statutes of the United States in this behalf.

Wherefore, your petitioner, The Interior Construction & Improvement Company, prays this honorable Court that said bond may be approved and said action removed to the Circuit Court of the United States for the Western District of New York, and that this Court proceed no further in the premises.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY,
By C. WALTER ARTZ,
*Attorney for Petitioner, Specially Appearing for the Sole Purpose of Presenting this Petition.*

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

C. Walter Artz, being duly sworn, says that he is the attorney for the defendant, The Interior Construction and Improvement Company, specially appearing for the sole purpose of presenting the foregoing petition; that he has read said petition and knows the contents thereof and the same is true, of his own knowledge, except as

to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

C. WALTER ARTZ.

Sworn to before me this 4th day of December, 1906.

J. C. LIMBURG,
*Notary Public for Erie Co., N. Y.*

9 STATE OF NEW YORK, *County of Erie, ss:*

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Judgment, Petition for Removal and Bond with the original thereof, entered and on file in the office of the Clerk of Erie County and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Buffalo, this 4th day of Dec. 1906.

[SEAL.] J. H. PRICE, *Clerk.*

Endorsed: Supreme Court, Erie County. Lathrop, Shea & Henwood Co., Plaintiff, against, The Interior Construction & Improvement Company, Defendant. Record on Removal. C. Walter Artz, Atty. for The I. C. & I. Co., specially appearing for purposes of motion only, 52 Broadway, New York City. U. S. Circuit Court, Western dist. of N. Y. Filed Dec. 4, 1906. Harris S. Williams, Clerk.

10 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of Albany, ss:*

Medford B. Farrington being duly sworn says that he is more than twenty one years of age; that on the 16th day of November, 1904, he served a copy of the summons and complaint in the above entitled action on Hon. John F. O'Brien, Secretary of State at his office at the Capitol at the City of Albany, and at the same time he delivered to the said Secretary of State Two Dollars ($2.00) as required by Section 16 of the General Corporation Law that he served the same and paid the said two dollars ($2.00) by delivering the same to and leaving the same with J. B. H. Mongin first Deputy Secretary of State; that he knew the person so served as aforesaid to be the said Deputy Secretary of State.

MEDFORD B. FARRINGTON.

Sworn to before me this 16th day of Nov. 1904.
[L. S.]
W. M. THOMAS,
*Notary Public, Albany Co.*

11 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY
*vs.*
THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

*Proof of Service.*

STATE OF NEW YORK, *County of New York, ss:*

Robert B. Killgore being duly sworn deposes and says that he is twenty eight years of age. That on the 4th day of November, at No. 32 Broadway, in the City, County and State of New York, he served the within summons and complaint on the defendant The Interior Construction & Improvement Company, by delivering to and leaving with Lewis F. Wilson a true copy thereof and at the same time exhibiting to him the original thereof. That the said Lewis F. Wilson is the Secretary of the defendant corporation.

ROBT. B. KILLGORE.

Sworn to before me this 4th day of November, 1904.
J. E. CONNELLY,
*Notary Public, N. Y. Co.*

12 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY
*vs.*
THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

*Proof of Service.*

STATE OF NEW YORK, *County of New York, ss:*

Robert B. Killgore, being duly sworn deposes and says that he is twenty eight years of age. That on the 24th day of October 1904, at No. 54 Wall Street, in the City, County and State of New York, he served the within summons and complaint on the defendant, The Pittsburg, Shawmut & Northern Railroad Company, by delivering to, and leaving with Frank Sullivan Smith a true copy thereof and at the same time exhibiting to him the original thereof. That said Frank Sullivan Smith so served is a Director of said defendant corporation.

ROBT. B. KILLGORE.

Sworn to before me this 27th day of October, 1904.
ROBT. B. KNOWLES,
*Notary Public, #61, New York Co.*

13 *Summons.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys, within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Trial to be held in the County of Erie:

Dated this 6th day of September, 1904.

BUSHNELL & METCALF,
*Attorneys for Plaintiff.*

Office & P. O. Address, No. 688-94 Ellicott Sq., Buffalo, N. Y.

14 *Complaint.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

The Plaintiff in the above entitled action for its cause of action against the defendants above named, by Bushnell & Metcalf, its attorneys, states and shows to this Court:

I. That at the times hereinafter mentioned, the plaintiff herein was and still is a domestic corporation, organized under and by virtue of the Laws of the State of New York.

II. That as plaintiff is informed and verily believes, during said period hereinafter mentioned, the defendant The Pittsburg, Shawmut & Northern Railroad Company was a railroad corporation, organized and existing under and by virtue of the laws of the State of New York, and the defendant The Interior Construction & Improvement Company was a foreign corporation organized and existing under and by virtue of the Laws of the State of New Jersey.

15 III. That prior to the year 1899, as plaintiff is informed and verily believes, The Pittsburg, Shawmut & Northern

Railroad Company was organized by the consolidation of various railroads then duly existing and operating within the States of New York and Pennsylvania and for the purpose of carrying out the plans of such consolidation undertook the construction of a railroad from certain points within the State of Pennsylvania to the village of Angelica in the State of New York and consolidating the line so to be constructed together with the other existing lines of railroad then owned or controlled by the said railroad company, that said Railroad Company duly made and entered into a contract or agreement with the defendant The Interior Construction and Improvement Company for the construction of said railroad, and in payment for the said construction, it agreed to issue, and thereafter did issue, unto the said Construction Company, its stocks and bonds for the full amount it had agreed to issue, which was largely in excess of the cost of construction of said railroad. That the said construction company was organized solely for the purpose of building said railroad and to secure to the promoters and organizers thereof the profits to be made in the construction of the railroad and the manipulation of its securities. That the officers, directors and owners of a large majority of the capital stock of the said railroad company were also the officers, directors, promoters and owners of the said construction company, and the affairs and the management of the said construction company were entirely controlled and managed by the said officers and directors of the said Railroad Company, and in truth and in fact as this plaintiff charges and avers the said Construction company was but the agent or repre-
16 sentative of the said railroad company which was and is responsible and liable for all of the acts and obligations of the said construction company in the construction of said railroad.

IV. That on the 20th day of May, 1902, the defendant the Interior Construction & Improvement Company duly made and entered into a contract or agreement in writing with this plaintiff, wherein and whereby this plaintiff agreed to build and construct that portion of the line of said the Pittsburg, Shawmut & Northern Railroad, between Clermont and Kasson, Pennsylvania, and which was known and designated as the "Warren-Brook Branch" of the said railroad. That said contract provided that the said plaintiff should do and perform the work of construction in the best and most workmanlike manner, and furnish the best material of their several kinds, at the several prices therein stated, all in conformity with the specifications annexed to said contract which were expressly made a part of the same; that this plaintiff begs leave to refer to said contract and to the specifications thereunto annexed, the same in all respects as though they were fully set forth in this complaint.

V. That pursuant to the terms of said contract this plaintiff entered upon the work of construction and did and performed the same according to its terms and in manner specified therein, and as directed by the officers, agents or representatives of the said defendants, and said work of construction so done and performed by the plaintiff was turned over to and accepted by said defendants on or before December 19th, 1903; that said contract provided

that payments should be made thereunder for the work of construction so done by the plaintiff upon the written estimates furnished by the chief engineer of the railroad company, and
17 plaintiff should likewise be paid for all extra work done or material furnished which was not provided for in said contract or specifications in the same manner and at the prices stated and agreed upon in said contract.

VI. That on the 14th day of June, 1902, the said defendant the Interior Construction & Improvement Company duly made and entered into a certain other and further contract or agreement in writing with this plaintiff wherein and whereby this plaintiff agreed to build and construct that portion of the line of the said the Pittsburg, Shawmut & Northern Railroad Company between the Villages of Bolivar and Angelica, in the County of Alleghany and State of New York, and being two divisions designated by the chief engineer of the said railroad company as the division from Bolivar to Friendship, about ten miles in length, and the division from Friendship to Angelica about twelve miles in length; that this contract also provided that the plaintiff should do and perform the work of construction in the best and most workman-like manner and furnish the best material of its several kinds, at the several prices therein stated, all in conformity with the specifications also annexed to this contract which were expressly made a part of the same; that this plaintiff likewise begs leave to refer to this contract and to the specifications thereunto annexed, the same in all respect as though they were fully set forth in this complaint.

VII. That pursuant to the terms of this contract this plaintiff entered upon the work of construction and did and performed the same according to its terms and in the manner specified therein, and as directed by the officers, agents or representatives of the said defendants, and said work of construction so done and performed by the plaintiff was turned over to and accepted by said defend-
18 ants on or before December 19th, 1903; that said contract also provided that payments should be made thereunder for the work of construction so done by the plaintiff upon the written estimates furnished by the chief engineer of the railroad company and plaintiff should likewise be paid for all extra work done or material furnished which was not provided for in said contract or specifications in the same manner and at the prices stater and agreed upon in this contract.

VIII. That in the performance of both of the said contracts and the construction of the said railroad in each of the divisions stated in said contracts this plaintiff expended large sums of money amounting to several thousands of dollars, and did and performed a great amount of extra work for the said defendants, which was not included in the said specifications or either of them, but which was done and performed under the direction of the chief engineer of the defendant the railroad company or the officers or agents of the said railroad company or the construction company, and which this plaintiff was entitled to receive payment therefor as extra work as provided by said contracts. That the chief engineer of the said railroad com-

pany who was to make and furnish plaintiff with the estimates upon which plaintiff was to be paid, did not include in said estimates true and correct measurements and classifications of the work so done by the plaintiff but declined and refused to make proper measurements and classifications and to include them in said estimates; that owing to these facts differences arose between this plaintiff and those defendants as to the correctness of the said chief engineer's measurements and classifications and also further differences as to claims made by the defendants for damages for the delay by plaintiff
19 in completing the said railroad; that the officers and agents of this plaintiff and of the said defendants at different times attempted and endeavored to settle and adjust their differences and determine the amount due to the plaintiff from the defendant the construction company.

IX. On the 19th day of December, 1903, the officers, agents or representatives of this plaintiff and of the said defendant the construction company met at the City of Olean, N. Y., and after full and th-rough consideration of the affairs and difference between the plaintiff and the defendants, agreed upon a settlement, adjustment and accord of the accounts, claims and differences then existing between the said plaintiff and the defendants, and arising and growing out of the said contracts of May 20th and June 14th, 1902, as hereinbefore stated, and then and there made and signed a memoranda stating and setting forth the said settlement, adjustment and accord of said claim and account of which the following is a copy:

*Memo. Agreement.*

Engineer's estimates as to measurements and classification to be accepted.

No claim to be made by the railroad company or construction company for damages for delay in completing road.

1. Contractors to have estimates for all work to date.

2. All labor furnished by I. C. & I. Co. to be paid for by contractors at actual pay roll plus ten per cent. McComb's bill to be adjusted with him.

3. Train service to be paid for at actual cost to I. C. & I. Co.

4. Bill as to extras to be investigated by President of road and bear explanation.

20 5. $8400.00 to be retained for unfinished work including any former estimate. If this amount has been held out in yardage it must be included. Work not to exceed this sum in any event.

6. Cash. Pay rolls at least to extent of $30,000 to be provided at once. Balance due to be paid as soon as state of accounts is determined.

7. Work to be stopped December 19th, 1903.

INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,

By F. P. BYRNE, *President.*

LATHROP, SHEA & HENWOOD COMPANY,

By W. L. HENWOOD, *Vice-President.*

X. That pursuant to said memoranda agreement and subsequent thereto, the defendant Construction Company furnished to this plaintiff a final estimate of the work done on the Warren Brook Branch under the contract of May 20th, 1902, by which it appeared that there was then due to this plaintiff the sum of eleven thousand, one hundred sixty dollars and fifty-five cents ($11,160.55). That in said estimate so made by the said Construction Company, there was an error in classification of seventeen hundred twenty-five (1725) cubic yards of arch culvert masonry included therein which was therein specified as rubble masonry, and charged in said estimate at five dollars, ($5.00) per cubic yard, instead of five dollars and ninety cents ($5.90) per cubic yard, the price agreed upon to be charged for arch culvert masonry; that by reason of said error in such classification these defendants were further indebted under said estimate for said seventeen hundred twenty-five (1725) cubic yards in the sum of fifteen hundred fifty-two dollars and fifty cents ($1552.50).

XI. That pursuant to said memoranda agreement said defendant the Construction Company also furnished the plaintiff with the November estimate of the work done on the Angelica and Bolivar divisions, by which it appeared that said defendant was indebted to the plaintiff in the sum of seven thousand thirty-one dollars and thirty-two cents ($7031.32), and likewise furnished the final estimate for the work done on said Angelica and Bolivar divisions by which it appeared that the defendants were indebted to this plaintiff in the further sum of fifty-three thousand three hundred seventy-nine dollars, forty-three cents ($53,379.43), both of which estimates were for the work done under the contract of June 14th, 1902.

21

XII. That plaintiff's bill for extra mentioned in the fourth item of said memoranda agrement, referred to the extra work which plaintiff did and performed under both of said contracts and agreements and was all done and furnished according to the terms, conditions and requirements of both of said contracts and agreement and the work done and material furnished were of the value as stated and charged for by the plaintiff in said bill for extras, of thirteen thousand, eight hundred nineteen dollars and ninety-six cents ($13,819.96).

XIII. That since the making of said agreement this plaintiff has endeavored to obtain a settlement and adjustment of its said bill for extras with the president and officers of the defendants, who have repeatedly investigated the same and heard explanations thereof, but who have wholly failed to agree with the plaintiff as to the amount of said bill for extras as provided and intended should be done by the said memoranda agreement.

XIV. That by reason of the facts and circumstances hereinbefore set forth and pursuant to the said memoranda agreement, the indebtedness owing by the defendants to the plaintiff is as follows:

| | |
|---|---|
| 22 Balance due on final estimate of Warren Brook Branch | $11160.55 |
| Error in classification of Arch Culvert masonry | 1552.50 |
| November estimate Angelica-Bolivar Branch | 7031.52 |
| Final estimate Angelica-Bolivar Branch | 53379.43 |
| Bill for extras | 13819.96 |
| | $86943.76 |

That by said memoranda agreement it was provided that defendants were to advance the sum of thirty thousand dollars, ($30,000.00) to pay and satisfy plaintiff's pay rolls, which defendants have done and defendants are therefore entitled to be credited with the same, together with certain other items which defendants have paid for on account of the plaintiff or for material furnished and labor done and they are entitled to the further credit of Twenty Thousand, five hundred sixty-seven dollars, forty-one cents ($20,567.41) making a total credit of fifty thousand, five hundred sixty-seven dollars, forty-one cents ($50,567.41), which deducted from the said sum so due the plaintiff as aforesaid leaves a balance of thirty-six thousand, three hundred seventy-six dollars, thirty-five cents $36,376.35), which is now due and owing by these defendants to this plaintiff.

This plaintiff for a second and further cause of action against the defendants above named further states:

I. That it reaffirms and realleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto the making of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged.

23 II. That in the said work of construction plaintiff was the owner and had in its use and possession one 45-ton Bucyrus Steam Shovel No. 138, and on or about the 25th day of October, 1903, plaintiff and the defendant construction company made and entered into a verbal agreement by which the said construction company was to take and use the said steam shovel and pay the plaintiff for such use twelve dollars and fifty cents a day ($12.50), together with the cost to plaintiff of removing the said steam shovel to the place designated by said construction company; that thereupon plaintiff did so remove the said steam shovel and the construction company took the same into its possession and continued to use the same until the 28th day of November, 1903, when the same was returned to plaintiff; that plaintiff paid fifty-three dollars and ninety-six cents ($53.96) as the cost of removing the same for which said defendants are indebted to this plaintiff, together with the further sum of three hundred and fifty dollars, ($350.00) the agreed rental of said steam shovel, making in all the sum of four hundred three dollars and ninety-six cents ($403.96)

The plaintiff for a third and further cause of action against the defendants above named further states:

I. That it reaffirms and realleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto, the

making of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged:

II. That in said work of construction this plaintiff was the owner of and had in its use and possession one little giant traction steam shovel and on or about the 21st day of October, 1903, the
21 plaintiff and the defendant construction company made and entered into a verbal agreement by which the said Construction Company was to take and use the said little giant traction steam shovel and pay the plaintiff for such the sum of twelve dollars and fifty cents ($12.50) per day; that thereupon the plaintiff delivered the same to the said defendant Construction Company who continued to use the same until the 15th day of January 1904 when they notified the plaintiff that they were through with the use of the same, and have since delivered the same to this plaintiff; that by reason thereof the said defendants became indebted to the plaintiff for the use of said little giant traction steam shovel for the period of eighty-six days (86) at the agreed price of Twelve dollars and fifty cents ($12.50) per day, amounting to one thousand and seventy-five dollars, ($1075.00)

This plaintiff for a fourth and further cause of action against the defendants above named, further states:

I. That it reaffirms and alleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto the making of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged:

II. That in said work of construction the plaintiff was the owner and had in its use and possession a certain masonry plant and the tools, implements and appliances thereunto belonging, and on or about the 15th day of August, 1903, this plaintiff made and entered into a verbal agreement with the said defendant the Construction Company by which the said Construction Company was to take and use the said masonry plant; that the plaintiff delivered the same to the defendant Construction Company, who continued
25 to use the same until the first day of December, 1903, when plaintiff demanded of the said defendant Construction Company the return of said masonry plant which defendant refused and neglected to return excepting one hoisting engine, which was a part of said masonry plant and was of the value of four hundred and fifty dollars ($450.00), and which said defendant did return to this plaintiff. That the value of the portion of said plant still retained by said defendant is the sum of three thousand dollars, ($3,000.00), for which sum the said defendants are indebted to the plaintiff.

This plaintiff for a fifth and further cause of action against the defendants above named further states

I. That it reaffirms and realleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto, the making of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged.

II. That in said work of construction the plaintiff was the owner

of and had in its use and posses-ion a certain stone crushing plant and on or about the 15th day of September, 1903, made and entered into a verbal agreement with the defendant the construction company, by which the said construction company was to take and use the said stone crushing plant and was to pay the plaintiff therefor the agreed price of one hundred dollars, ($100.00) per month, that the plaintiff delivered the same to the defendant construction company, who continued to use the same until the 15th day of April, 1904, when the said defendant returned the same to the plaintiff; that by reason thereof said defendants became in-
26 debted to the plaintiff for the use of said Plant for the period of seven (7) months at the agreed price of one hundred dollars ($100.00) per month, amounting to seven hundred dollars ($700.00).

This plaintiff for a sixth and further cause of action against the defendants above named further states:

I. That it reaffirms and realleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto, the making of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged.

II. That in said work of construction plaintiff was the owner and had in its use and possession at the City of Buffalo, N. Y., one certain pile driver and engine and outfit and on or about the 20th day of September, 1903, the plaintiff and the said defendant construction company made and entered into a verbal agreement by which the said construction company was to take and use the said pile driver, engine and outfit and pay the plaintiff for such use the sum of one hundred dollars ($100.00) per month, together with the cost incurred by plaintiff in shipping the same to the said defendant; that thereupon the plaintiff did so ship and deliver said pile driver, engine and outfit and the said Construction Company took the same into its possession and continued to use the same until on or about the 20th day of December, 1903, when plaintiff duly demanded the return of said pile driver, engine and outfit, and which said defendant Construction Company refused and neglected to return. That the value of said pile driver, engine and outfit was the sum of nine hundred and fifty dollars ($950.00); that by reason thereof said defendants became indebted to this plaintiff for the use of said pile driver, engine and outfit for three months
27 at the agreed price of one hundred dollars ($100.00) per month, three hundred dollars, ($300.00), and the value of said pile driver, engine and outfit, nine hundred and fifty dollars ($950.00), and for the expense incurred in shipping said pile driver, engine and outfit thirty-three dollars and fifty cents ($33.50), amounting in all to the sum of twelve hundred eighty-three dollars and fifty cents ($1283.50).

This plaintiff for a seventh and further cause of action against the defendants above named further states:

I. That it reaffirms and realleges all of the facts stated in the first cause of action as to the incorporation of the parties hereto, the mak-

ing of the several contracts and agreements for construction of said railroad and the performance of the same by the plaintiff as hereinbefore alleged:

II. That in said work of construction the plaintiff was the owner and had in its possession a certain pile driver at Swaines, N. Y., and did on or about the 18th day of September, 1903, make and enter into a verbal agreement with the defendant the Construction Company by which the said Construction Company was to take and use the said pile driver and was to pay the plaintiff therefor the agreed price of one hundred dollars, ($100.00) per month; that the said plaintiff delivered the same to the defendant, who continued to use the same until the 18th day of November, 1903, when the said defendant returned the same; that by reason thereof said defendants became indebted to the plaintiff for the use of said pile driver for the period of two months at the agreed price of one hundred dollars ($100.00) per month, amounting to two hundred dollars ($200.00).

Wherefore, plaintiff demands judgment against said de-
28 fendants for the sum of forty-three thousand and thirty-eight dollars and eighty-eight cents ($43,038.88), together with interest on thirty-six thousand three hundred sixty-three dollars and thirty-five cents ($36,363.35), from the first day of February, 1904; on four hundred and three Dollars and ninety-six cents ($403.96) from the 28th day of December, 1903; on one thousand seventy-five Dollars ($1075.00) from the 15th day of February, 1904; on three thousand Dollars ($3000) from the 1st day of January, 1904; on seven hundred Dollars ($700.00) from the 15th day of May, 1904; on twelve hundred eighty-three Dollars and fifty cents ($1283.50) from the 20th day of January 1904, and on two hundred Dollars ($200.00) from the 18th of December, 1903, besides the costs of this action.

BUSHNELL & METCALF,
*Plaintiff's Attorneys.*

No. 688-94 Ellicott Sq., Buffalo, N. Y.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

John J. Shea being duly sworn deposes and says that he is one of the officers of the plaintiff corporation, to-wit, its General Manager; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN J. SHEA.

Sworn to before me this 3rd day of Sept., 1904.

CHARLES G. SIGNOR,
*Notary Public for Orleans Co.*

Certificate filed in Erie Co.

29 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Impleaded with the PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, Defendants.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

J. H. Metcalf, being duly sworn deposes and says that he is one of the attorneys for the plaintiff in the above entitled action. That this action was commenced by the personal service of the summons and complaint herein upon the defendant The Pittsburg *Sawh*mut & Northern Railroad Company on the 24th day of October, 1904 and that said defendant appeared herein and served its answer to the plaintiff's complaint. That the issues so joined were duly referred to Charles B. Wheeler, Esq., as Referee to hear, try and determine and are now pending before him. That the summons and complaint in said action were served upon the defendant The Interior Construction & Improvement Company on the 16th day of November, 1904, by serving the same on the Secretary of State of the State of New York, as appears by the proof of service annexed to said summons and complaint; that more than twenty days have elapsed since the service of said summons and complaint; that the said defendant, The Interior Construction & Improvement Company has not appeared or answered herein, excepting it appeared specially by C. Walter Artz, Esq., as attorney for said defendant for the purposes only of moving to set aside the service of the said summons upon said defendant, and duly made a motion at a special term of this Court, held in and for the County of Erie, on the 7th day of Dec., 1904, to set aside the service of said summons and complaint so made upon the Secretary of State, as irregular and void.

30 That said motion was duly heard by said Court and denied; that on the 14th day of December, 1904, said defendant appealed from said order so denying said motion, to the Appellate Division of this Court, Fourth Judicial Department, which appeal was duly heard by said Court and on the 11th day of January, 1905, the said Appellate Division duly affirmed said order so appealed from; that on the 23d day of January, 1905, said defendant duly moved the said Appellate Division for an order allowing it to appeal to the Court of Appeals from the order of affirmance which motion was on the 26th day of January 1905 denied by said Appellate Division and an order thereon duly entered in the office of the Clerk of the County of Erie; that on the 6th day of February, 1905, said defendant by said C. Walter Artz, Esq., its attorney appearing specially, presented its petition to this Court for the removal of said action to the Circuit Court of the United States for the Western District of New York, as allowed by statute in such case made and provided, and which petition was granted and the bond required made and filed.

That on the 9th day of February, 1905, said defendant, The Interior Construction & Improvement Company specially appearing by C. Walter Artz, for the purpose of said motion only, obtained from Hon. John R. Hazel, U. S. District Judge, an order requiring the plaintiff to show cause before the United States Circuit Court on the 14th day of February, 1905, why the service of the summons and complaint upon the Secretary of State of the State of New York should not be set aside and declared null and void as to the defendant The Interior Construction & Improvement Company, and said order further provided that the time of the said defendant to
31 enter a general appearance in said action in the United States Circuit Court and answer or plead to the complaint herein or to make such motion or to take such further action with respect thereto as it may be advised, was extended by said order to show cause for a period of twenty days after the hearing and determination of said application to set aside the service of the summons in said action.

That on the 11th day of February, 1905, the plaintiff herein duly obtained from Hon. John R. Hazel, United States District Judge an order requiring the defendant The Interior Construction & Improvement Company to show cause before the United States Circuit Court, on the 14th day of February, 1905, why the proceedings brought by the said defendant should not be set aside and vacated as irregular and void, and the said action remanded to the Supreme Court of the said State of New York. That on the return of both of said orders to show cause the said United States Circuit Court granted the motion so made by the plaintiff herein and remanded said cause to the Supreme Court of the State of New York in and for the County of Erie, and vacated and set aside the said proceedings to remove said action as irregular and void, and also denied the motion of the defendant The Interior Construction & Improvement Company to set aside the service of the summons herein upon the Secretary of State of the State of New York; that orders in pursuance of said decisions were duly entered and filed in the office of the Clerk of the County of Erie.

Deponent further says that more than twenty days have expired since the service of the summons and complaint upon the defendant The Interior Construction & Improvement Company as hereinbefore stated; that said defendant has not appeared or answered
32 herein excepting as hereinbefore stated; that no other extension of said defendant's time to appear or answer has been granted by stipulation or by order of this Court or any Judge thereof, having jurisdiction to grant the same, and said defendant, The Interior Construction & Improvement Company is in default in not appearing or pleading herein.

J. H. METCALF.

Sworn to before me this 23d day of September, 1905.

GEORGE H. SELLERS,
*Notary Public, Erie County.*

33 At a Special Term of the Supreme Court held in and for the County of Erie at the City & County Hall, in the City of Buffalo, New York, on the 25th day of September, 1905,

Present: Honorable Truman C. White, Justice Presiding.

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*against*

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Impleaded with Pittsburg, Shawmut & Northern Railroad Company, Defendants.

On reading and filing the affidavit of J. H. Metcalf, verified the 23d day of September, 1905, showing that the defendant Interior Construction and Improvement Company has been duly served with a summons and complaint herein and that more than twenty days have elapsed since the service upon said defendant as stated in said affidavit is complete and that said defendant has not appeared herein nor served any answer or demurrer to the plaintiff's complaint, excepting that it appeared specially for the purpose of making a motion to set aside the service of the summons and remove this action to the United States Circuit Court for the Western District of New York, and which motions were denied,

Now on motion of Bushnell & Metcalf, plaintiff's attorneys,

Ordered that William H. Means, Esq., of Buffalo, New York, is hereby appointed a referee to take proofs of the cause of action set forth in the plaintiff's complaint and to examine the plaintiff or his attorney or agent on oath respecting any payments made to the plaintiff or to anyone for its use and properly applicable upon the amount claimed to be due the plaintiff in said complaint.

Erie Special Term, Sept. 25, 1905. Granted & ordered entered in Erie County Clerk's office.

PERRY E. WURST,
*Sp. Dp. Clk.*

34 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Impleaded With the Pittsburg, Shawmut & Northern Railroad Company, Defendant.

To the Supreme Court of the State of New York:

I, William H. Means, the Referee appointed by an order of this Court in the above entitled action, made and entered on the 25th day of September, 1905, to whom it was referred to take proof of the cause of action set forth in the plaintiff's complaint and examine the plaintiff or his attorney or agent on oath respecting any pay-

ments made to the plaintiff or to anyone for its use and properly applicable upon the amount claimed to be due the plaintiff in its complaint, do respectfully report:—

That on the 26th day of September, 1905, at three o'clock P. M. I was duly attended by Bushnell & Metcalf, the attorneys for the plaintiff who appeared by J. H. Metcalf, counsel, and having taken and subscribed the oath as Referee as required by law and taken the proof and examined the witness then produced on behalf of the plaintiff as to the allegations contained in the complaint and the payments made as aforesaid, do report as follows:—

That the allegations contained in each of the several causes of action set forth in the plaintiff's complaint were duly proven before me and no payments have been made to the plaintiff or anyone for its use and properly applicable upon the amount claimed to be due the plaintiff in its complaint excepting as is alleged and
35 set forth therein and that there is now due the plaintiff upon the several causes of action as follows:—

| | |
|---|---|
| Upon the 1st cause of action | $36376.35 |
| Int. from 1st day of Feb. to date of this report, amounting to | 3616.36 |
| Upon the 2nd cause of action | 403.96 |
| Int. from the 28th day of Dec., 1903 to date of this report, amounting to | 42.41 |
| Upon the 3rd cause of action | 1075.00 |
| Int. from the 15th day of Feb., 1904 to date of this report amounting to | 104.28 |
| Upon the 4th cause of action | 3000.00 |
| Int. from the 1st day of Jan., 1904 to date of this report, amounting to | 313.50 |
| Upon the 5th cause of action | 700.00 |
| Int. from the 15th day of May, 1904, to date of this report, amounting to | 57.40 |
| Upon the 6th cause of action | 1283.50 |
| Int. from the 20th day of Jan., 1904 to date of this report amounting to | 129.85 |
| Upon the 7th cause of action | 200.00 |
| Int. from the 18th day of Dec., 1903 to date of this report, amounting to | 21.30 |
| Total amount so due the plaintiff at the date of this Report including such interest is | $47323.91 |

That annexed hereto is the testimony and proceedings taken and had before me, the testimony having been by me read over to the witness and duly subscribed and sworn to.

All of which is respectfully submitted.

WILLIAM H. MEANS, *Referee.*

Dated Buffalo, N. Y., Sept. 27th, 1905.
Fees $20.00 paid.

36 STATE OF NEW YORK:

Supreme Court, County of Erie.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, etc., Defendant.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

I, William H. Means, the Referee, appointed by the order of Hon. Truman C. White, Judge, in the above entitled action, dated Sept. 25th, 1905 do solemnly swear that I will faithfully and fairly discharge my duty upon the reference herein, and make a just and true report, according to the best of my understanding.

WILLIAM H. MEANS.

Sworn to before me, this 26 day of Sept. 1905.

JAMES T. DRISCOLL,
*Notary Public, Erie Co.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

Proceedings had before William H. Means, Referee appointed by order of the Court made and entered the 25th day of Septem-
37 ber, 1905, to take the proof of the cause of action set forth in the plaintiff's complaint and to examine the plaintiff or his attorney or agent on oath, respecting any payments made to the plaintiff or to anyone for its use and properly applicable upon the amount claimed to be due the plaintiff in his complaint.

Hearing held before the Referee at the office of Bushnell & Metcalf, No. 690 Ellicott Square, Buffalo, N. Y., on the 26th day of September, 1905, at three o'clock p. m.

J. H. Metcalf appeared as counsel for the plaintiff.

JOHN J. SHEA, being called as a witness and sworn, testified as follows:

Q. Mr. Shea, where do you live?
A. At the present time in Buffalo.
Q. Are you an officer of the Lathrop Shea & Henwood Co.?
A. Yes, sir.
Q. What is your office?

A. General Manager.
Q. As such what are your duties?
A. I have charge of the construction work.
Q. What is the business of the plaintiff?
A. General contracting.
Q. Is the plaintiff a corporation, organized under what laws?
A. The laws of the State of New York.
Q. And has been for how long?
A. Three and one half years.
Q. Do you remember the circumstances of the plaintiff making the contract with the Interior Construction & Improvement Company for the construction of a part of the Pittsburg, Shawmut & Northern Railroad?
A. Yes, sir.
38 Q. How many contracts were made?
A. Two contracts.
Q. Do you remember the date of the first one?
A. Yes, sir; sometime in May, middle of May.
Q. Is this the first contract that I call your attention to?
A. Yes, sir.
Q. That is dated what day?
A. The 20th of May.
Q. Turn to the signatures of that. That was executed by whom?
A. Mr. Lathrop, our President, and F. C. Byrne, the President of the Interior Construction & Improvement Company.
Q. Under that contract what did you do?
A. Ten days after the contract was signed, we began operations, or the work.
Q. And continued until when?
A. Until the job was completed the latter part of 1903.
Q. Which territory or part of the railroad did that call for the construction of?
A. Between Clermount and Kasson, Pa., the Warner, Brooke Branch.
Q. Did you subsequently make another contract?
A. Yes, sir.

(Contract offered and received in evidence and marked Exhibit "A.")

Q. Did you subsequently enter into another contract with the Interior Construction & Improvement Company?
A. Yes, sir.
Q. Is that the paper I show you?
A. Yes, sir.
Q. What is the date of it?
A. 14th of June, 1902.
Q. And that is executed by whom?
A. E. F. Lathrop, our President, and F. P. Byrne, President of the Interior Construction & Improvement Company.
39 Q. And provided for the construction of what?
A. Two sections of the railroad, one section between Bolivar

and Friendship, N. Y., and the other section between Friendship and Angelica, N. Y.

(Received in evidence and marked Exhibit "B.")

Q. Did you enter upon the work of the second contract?

A. Yes, sir; about ten days after the signing of the contract and continued until the work was completed about the latter part of 1903.

Q. What did you have to do with this work personally?

A. I had charge of the construction work, together with Mr. Henwood.

Q. You are personally conversant with all the work that was done?

A. Yes, sir.

Q. And with the materials furnished?

A. Yes, sir.

Q. And with all the matters pertaining to the execution of both of those contracts?

A. Yes, sir.

Q. Do you remember whether or not there were differences between the officers of the Int. Cons. and Improvement Company and the Railroad Co. and the Lathrop Shea & Henwood Company, pertaining to this work and the payment for it?

A. There were.

Q. What were the principal matters of difference?

A. Chiefly in relation to the measurements and classification.

Q. That resulted in what?

A. In a meeting which was held at the Olean House in the City of Olean, in December, 1903.

Q. Now, were you unable to agree between yourselves prior to this meeting as to the classification of the work, the estimates and the payments?

A. Yes, sir.

Q. And what was the claim of the plaintiff, Lathrop Shea & Henwood Company?

A. That we were underestimated and underclassified.

40 Q. And what was the claim of the Railroad Co. and the Construction Company?

A. They took the position that the classification and measurements were all right.

Q. Now, do you remember of there being a meeting that you referred to at the Olean House in the City of Olean in December 1903, did you attend that meeting?

A. Yes, sir.

Q. Who was there, who represented the different parties?

A. The Pittsburg, Shawmut & Northern Railroad and the Interior Construction & Imp. Co. were represented by Maj. John Byrne, Frank P. Byrne, Frank Sullivan Smith, Mr. Bonzano, and Mr. McComb. They were the chief ones, and for the Lathrop, Shea & Henwood Company, there was Mr. E. F. Lathrop, President, Walter L. Henwood, Vice-President, Thos. Sprague, Treasurer, John J. Shea, General Manager and Mr. Clarence M. Bushnell.

Q. What was the result of that meeting?

A. We entered into an agreement.
Q. Is this the agreement entered into?
A. Yes, sir.

(Agreement offered in evidence, received and marked Ex. "C.")

Q. After the making of that agreement, what was done?
A. Subsequently we held a meeting in Buffalo to discuss the matters set forth in this agreement of Dec. 19th, 1903. This meeting was held sometime in Feb. 1904.
Q. Were you able to come to any arrangement or agreement there?
A. No, sir.
Q. Did you ever after that, come to any agreement with either the Int. Cons. Co. or the Railroad Company, as was agreed you would do, under the memoranda agreement of Dec. 19th?
A. No, sir.
Q. Never able to?
A. No, sir.
Q. Did the Railroad Co. or the Cons. Co. after that, make any claim for damages for delay in completing the road?
A. No, sir, not after that.
41 Q. Were you furnished with the estimates of the work up to that date?
A. Yes, sir.
Q. I show you the estimate dated October 1903; by whom is that estimate made?
A. Mr. Bozano.
Q. And he was who?
A. The Chief Engineer of the Railroad Company.
Q. How much does it appear by that estimate that they were indebted to you?
A. $11,160.55.
Q. I offer that in evidence.

(Received and marked Exhibit "D.")

Q. In this estimate there was an item of 1725 cu. yards of arch culvert masonry, which was specified in this estimate as rubble masonry, and charged in this estimate at $5.00 per cu. yrd. Was that item right?
A. No, sir.
Q. How should that have been charged?
A. At $5.90 per cu. yd.
Q. What was that the price of?
A. That was the price agreed upon between Mr. Bonzano and myself for arch culvert masonry.
Q. And this 1725 cu. yds. of that masonry being charged at $5.00 when it should have been charged at $5.90, makes this estimate how much less than it should be?
A. $1552.50.
Q. So this estimate in which there is $11,160.55 due is $1552.50 less than it should be. Is that right?
A. Yes sir.

Q. How does it come, Mr. Shea, that these estimates which were furnished by the Construction Company appear to have been signed by the Chief Engineer of the Railroad Company?

A. The estimates were always made out by the Chief Engineer of the Railroad Co. and furnished us by the Cons. Co.

Q. That is the way all of the work was done?

A. Yes sir; throughout the entire contract.

Q. And this estimate was furnished by the Cons. Co.?

A. Yes, sir.

42 Q. Has any of the amount of $11,160.55 or the $1552.50 ever been paid you?

A. No, sir.

Q. Still due and owing?

A. Yes, sir.

Q. Under this memoranda agreement they also furnished you what?

A. November estimate for the Bolivar-Angelica contract.

Q. Is this the paper they furnished you?

A. Yes, sir.

Q. By that paper how much does there appear was due upon it?

A. $7,031.32.

Q. Is this one of the estimates furnished by the Cons. Co. to you?

A. Yes, sir.

Q. And signed by whom?

A. Mr. Bonzano the Chief Engineer of the Railroad Company.

(Paper offered, received in evidence and marked Exhibit "E.")

Q. Has any of this sum of $7,031.32 owing upon this estimate that I showed you been paid?

A. No, sir.

Q. Still due and owing?

A. Yes, sir.

Q. By this memoranda agreement they were to furnish a final estimate of the Angelica-Boliver Branch, did they do that?

A. Yes, sir; they did.

Q. Is this the paper?

A. Yes, sir.

Q. How much is there due according to that?

A. $53,379.43.

Q. And this is the estimate that was furnished you by whom?

A. By the Int. Cons. & Imp. Company.

(Offered and received in evidence and marked Ex. "F.")

Q. Has any of that $53,379.32 been paid?

A. No, sir.

43 Q. Still due and owing?

A. Yes, sir.

Q. Now, according to this memoranda agreement, you had done extra work for the defendants and furnished materials, and so on, as you are required to do?

A. Yes, sir.

Q. And at the time of the making of that memoranda agreement, was there an amount due you for extra work and material?

A. Yes, sir.

Q. Did you furnish bills and statements of the amount of that extra work?

A. Yes, sir.

Q. And have those bills and statements been investigated by the representatives of the Railroad and Construction Company?

A. Yes, sir.

Q. And by your statement of accounts, do you know the amount of that bill for extra work?

A. Yes, sir.

Q. What is the amount?

A. $13,819.96.

Q. By this memoranda agreement, they were to make certain advances to you. Do you know whether that has been done or not?

A. Yes, sir; it was.

Q. To what amount?

A. To $30,000.

Q. And that was received by the plaintiff?

A. Yes, sir.

Q. And what application did you make of that?

A. Credited it on the indebtedness owing us under these estimates.

Q. Upon all three of the estimates?

A. Yes, sir.

Q. There was stated in the complaint that defendants have done certain work for you and furnished certain material for which they are entitled to a further credit. Do you know how much that credit is?

A. $20,567.41.

Q. Has that been credited to the defendant- upon their account?

A. Yes, sir.

44 Q. What is the total amount of the credit so made and given to the defendants.

A. $50,567.41.

Q. And that leaves a balance upon the amount due the plaintiff, which you have testified to, of how much?

A. $36,376.35.

Q. That is the proof going to make up the first cause of action. We will commence now with the second cause. During the time of this construction, was the plaintiff the owner of a steam shovel?

A. Yes, sir.

Q. Describe that shovel?

A. That was a 45-ton Bucyrus steam shovel. No. 138.

Q. Was there a time when you leased that shovel to the Construction Company?

A. Yes, sir.

Q. When was that?

A. The 25th of October, 1903.

Q. What was the arrangement under which they took that?

A. They were to pay us $12.50 per day until the steam shovel was returned to us.

Q. And how long did they retain it?

A. To the 20th of November, 1903.

Q. And how much did the rental at the agreed price of $12.50 per day amount to?

A. The Int. Cons. & Imp. Co. had the steam shovel 28 days at $12.50 per day, amounting to $350.00, together with the cost of moving the steam shovel which amounted to $53.96, making a total amount due us on account of this rental as per agreement, of $403.96.

Q. Has any part of that been paid?

A. No, sir.

Q. Now due and owing?

A. Yes, sir.

Q. The next item is the third cause of action. Were you during the time of the construction the owner of a Little Giant Traction steam shovel?

A. Yes, sir.

45 Q. Did you make any arrangement with the defendant the Cons. Co. or some officer of it, concerning the use of that?

A. Yes, sir.

Q. Who was that?

A. McComb, the Chief Engineer of the Cons. Co.

Q. What was the arrangement in regard to this Little Giant steam shovel?

A. We were to receive $12.50 per day for the use of the steam shovel until it was returned.

Q. Was it returned to you?

A. Yes, sir.

Q. When?

A. About the 15th of January 1904.

Q. How many days did they have it?

A. They had it 86 days at $12.50 per day and that amounts to $1075.00.

Q. Has any part of that been paid?

A. No, sir.

Q. The next item is the fourth cause of action. It is concerning a masonry plant. Were you the owners of a masonry plant during the construction of this work?

A. Yes, sir.

Q. Did you have any conversation with any of the officers and if so, with whom, concerning that masonry plant?

A. Yes, sir. I had a conversation with Mr. F. P. Byrne, the Pres. of the Cons. Co. and with Mr. McComb the Chief Engineer of the Cons. Co., that we would loan them this plant for exchange of ballast cars until Dec. 1903, at which time the plant was to be returned to us free of cost and in as good condition as they received it, barring ordinary wear and tear.

Q. And what did this masonry plant consist of?

A. Derricks, hoisting engine, blocks, ropes, etc.

Q. When was it delivered to them?
A. About the middle of August 1903.
Q. Has that ever been returned to you?
A. A portion of it.
Q. What was returned to you of that?
46 A. One hoisting engine.
Q. Has the balance ever been returned to you?
A. No, sir.
Q. What was the value of that masonry plant?
A. The entire value was $3450.00.
Q. And what was the value of the hoisting engine that they did return?
A. $450.00.
Q. And the value of the property that they did not return was what?
A. $3,000.00.
Q. Has any of that ever been paid?
A. No, sir.
Q. Now due and owing?
A. Yes, sir.
REFEREE: How did you arrive at your value of the masonry plant?
A. I figured what it cost us less the percentage of wear and tear and depreciation.
Q. Did you have an inventory of the items and articles that were included in that masonry plant?
A. Yes, sir.
Q. Did you furnish that inventory to the defendants?
A. Yes, sir; on two or three occasions.
Q. Was the price that you mentioned of this masonry plant in that inventory accepted by them?
A. It was never questioned by them.
Q. You are acquainted with the value of such property?
A. Yes, sir.
Q. You have seen that bought and sold and know the value of that kind of property?
A. Yes, sir.
Q. What in your opinion was the value of it?
A. $3,000 was a very fair value in December, 1903.
47 Q. The 5th cause of action refers to a stone crusher? Was the plaintiff the owner of a stone crushing plant in the month of September, 1903?
A. Yes, sir.
Q. Did you have any transaction with the defendant in relation to that plant. If so, when and where?
A. About the middle of August, Mr. McComb the Chief Engineer of the Cons. Co. made an arrangement with me whereby he would pay us $100.00 per month for the use of the stone crushing plant. The plant was delivered to them about the middle of August 1903.
Q. It was delivered about the middle of August?
A. Yes, sir, and they paid one month's rent, $100.00 on it.

Q. Did they subsequently return it?
A. Yes, sir.
Q. When?
A. The 15th of April, 1903.
Q. How long did they have it in their possession?
A. 8 months.
Q. How much is due to you by reason of their leasing that stone crushing plant.
A. They paid $100.00 and there is $700.00 still due us.
Q. Has any of that been paid?
A. No, sir.
Q. Now due and owing?
A. Yes, sir.
Q. The next is the 6th cause of action. There is mentioned a pile driver, engine and outfit. Were you the owners of such a pile driver, engine and outfit?
A. Yes, sir.
Q. Where was that?
A. It was shipped from Buffalo, N. Y. to Smithport, Pa.
Q. Did you have a conversation with one of the officers of the defendant regarding that?
A. Yes, with Mr. McComb, the Chief Engineer of the Cons. Co.
Q. When was that conversation and what was the substance of it?
48 A. About the 15th of September, 1903, Mr. McComb came to me and wanted a pile driver, engine and outfit. I told him I would rent him one for $100.00 per month, and he agreed to this proposition?
Q. When was that shipped to him?
A. The 20th of September, 1903.
Q. What was said about their incurring the expense of moving it?
A. Mr. McComb agreed with me that he would pay all expenses in connection with moving this pile driver.
Q. Did you have a conversation subsequently with Mr. McComb about this pile driver?
A. Yes, sir.
Q. When was that?
A. December, 1903.
Q. What was that conversation?
A. I requested Mr. McComb to return this pile driver if he was through with it.
Q. And what did he do?
A. He said that he was all through with it, but he did not return it.
Q. How much was the amount of the rental under the arrangement that you made with him?
A. Three months' rent at $100.00 per month was $300.00 for rental and $33.50 was expense incurred in shipping the pile driver.
Q. What was the value of the pile driver?
A. $950. was the value on the 20th of December, 1903.
Q. And is $950.00 the fair value of this pile driver?

A. Yes, sir.
Q. It was worth that?
A. Yes, sir.
Q. Has any of the $1283.50 the amount of the value, and the rental and cost of shipping been paid you?
A. No, sir.
Q. Now due and owing?
A. Yes, sir.

49 Q. The 7th cause of action is in regard to a pile driver at Swains. What was there to that?

A. On or about the 18th of September, Mr. McComb wanted a pile driver at Swains and we agreed to rent him one for $100.00 per month.
Q. Was that delivered to him?
A. Yes, sir.
Q. When was it delivered?
A. On the 18th of September.
Q. How long did he retain it?
A. Until the 18th of November 1903, two months.
Q. Then he returned it to you?
A. Yes, sir.
Q. And how much did that rental amount to?
A. $200.00.
Q. Has any of it been paid?
A. No, sir.
Q. Still due and owing?
A. Yes, sir.
Q. You may state Mr. Shea the amounts that are due the plaintiff and interest from what dates?
A. The total amount is $43,038.81, together with interest on $36,376.35 from the first day of February, 1904; on $403.96 from the 28th day of December, 1903; on $1075 from the 15th day of February, 1904; on $3000, from the 1st day of January, 1904; on $700.00 from the 15th day of May, 1904; on $1283.50 from the 20th day of January, 1904; on $2000.00 from the 18th day of December, 1903.
Q. Are all of those amounts including the items of interest, now due, and owing to the plaintiff?
A. Yes, sir.
Q. Have any payments been made upon these amounts which are stated and alleged in the complaint to be due as you have stated here?
A. No, sir; no payments whatever have been made.

(Signed) JOHN J. SHEA.

Subscribed and sworn to before me this 27th day of September, 1905.

(Signed) WILLIAM H. MEANS,
*Referee.*

50 At a special term of the Supreme Court, held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 27th day of September, 1905.

Present: Hon. Truman C. White, Justice Presiding.

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Impleaded with the PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, Defendant.

An order having heretofore been entered in the above entitled action on the 25th day of September, 1905, appointing William H. Means, Esq., of Buffalo, N. Y., Referee herein to take proof of the causes of action set forth in the plaintiff's complaint and to examine the plaintiff or its attorney or agent on oath respecting any payments made to the plaintiff or to anyone for its use and properly applicable upon the amount claimed to be due the plaintiff in said complaint, and the said Referee having taken the proofs so presented to him and having made and signed his report which bears date the 27th day of September, 1905, and by which it appears that there is at the date of the said report due to the plaintiff from the said defendant The Interior Construction & Improvement Company, the sum of Forty Seven Thousand, Three hundred twenty-three dollars and ninety-one cents ($47,323.91), and on reading and filing
51 the said report together with the said order of reference and the proof of the default of the said defendant,

Now on motion of Bushnell & Metcalf, attorneys for the plaintiff,

*Ordered*, that the report of the said Referee be and the same is hereby confirmed, and that judgment herein be entered by the Clerk of this Court in favor of the plaintiff Lathrop Shea & Henwood Company and against The Interior Construction & Improvement Company, defendant, for the sum of Forty Seven thousand, three hundred and twenty-three dollars and ninety-one cents ($47,323.91).

Enter W.

Granted Sept. 27, 1905.

PERRY E. WURTZ,
*Spl. Dep. Clerk.*

52 Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Impleaded with the PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, Defendant.

*Judgment September 27th*, 1905.

The plaintiff in the above-entitled action having presented due proof of the service of the summons and complaint upon the defendant The Interior Construction & Improvement Company more than twenty days since, exclusive of the day of service, and the said defendant not having appeared in any manner, excepting specially for the purpose of making a motion to set aside the service of the summons, and to remove this action to the United States Circuit Court for the Western District of New, York, and said motions having been denied, and the plaintiff having made due proof of such default and the Court having appointed a Referee herein to take the proof of the causes of action set forth in the plaintiff's complaint and to examine the plaintiff or his attorney or agent on oath respecting any payments made to the plaintiff, and the said Referee having duly made his report which has been duly confirmed and filed, and the Court having ordered and directed that judgment be entered in favor of the plaintiff for the amount due the plaintiff as found by the said Referee,

Now on motion of Bushnell & Metcalf, attorneys for the plaintiff, it is

53 Adjudged, that the plaintiff Lathrop Shea & Henwood Company recover of the defendant The Interior Construction & Improvement Company, the sum of Forty-seven thousand three hundred and twenty three dollars and ninety-one cents ($47,323.91), together with Thirty-nine dollars and twenty four cents ($39.24), costs and disbursements, amounting in all to the sum of Forty seven thousand three hundred and sixty three dollars and fifteen cents, ($47,363.15), and have execution therefor.

Judgment signed 27th September, 1905.

C. W. CHAPIN,
*Dep. Clerk.*

STATE OF NEW YORK, *County of Erie, ss:*

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Judgment Roll with the original thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the

seal of said County and Courts, at Buffalo, this 24th day of October, 1905.

[L. S.] J. H. PRICE, *Clerk.*

Endorsed: Supreme Court, Erie County.—Lathrop, Shea & Henwood Co. *vs.* Pittsburg, Shawmut and Northern Railroad Co.—Judgment Roll.—Bushnell & Metcalf, Att'ys, for Plaintiff, 688-694 Ellicott Sq., Buffalo, N. Y.—Filed Erie County Clerk's Office Sept. 27, 1905, 4.19 P. M.

54 *Judgment.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY
*vs.*
THE PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, Impleaded with THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY.

The issues in this action raised by the complaint herein and the answer of the defendant The Pittsburg, Shawmut & Northern Railroad Company having been referred to Hon. Chas. B. Wheeler, of Buffalo, N. Y., to hear try and determine by an order of the Supreme Court duly granted on the 22nd day of May, 1905; and duly entered, and the allegations and proofs on the part of the plaintiff having been heard and considered by said Referee and the said plaintiff having rested its case and said defendant upon the close of said plaintiff's case having moved for non-suit and dismissal of said plaintiff's complaint and said Referee having duly made his report herein dated October 25th 1905, granting said motion of said defendant for said non-suit and dismissal and directing judgment that said complaint be dismissed as to said defendant Railroad Company with costs against said plaintiff to be taxed.

Now, on the motion of Smith & Dickson, Attorney for said defendant, It is Ordered and Adjudged that the complaint of the plaintiff herein be and the same hereby is dismissed as to said defendant The Pittsburg, Shawmut & Northern Railroad Company and that said defendant The Pittsburg, Shawmut & Northern Railroad Company recover of the plaintiff the sum of Five hundred ninety
55 one 92/100 dollars its costs and disbursements in this action and have execution therefor.

Judgment signed this 26th day of October, 1905.

CHESTER W. CHAPIN,
*Dep. Clerk.*

STATE OF NEW YORK, *County of Erie, ss:*

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Judgment with the original thereof, entered and on

file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Buffalo, this 30th day of Oct. 1905.

[L. S.] J. H. PRICE, *Clerk*.

Endorsed: Supreme Court, Erie County. Lathrop, Shea & Henwood Company, *vs.* The Pittsburg, Shawmut & Northern R. R. Co. Impleaded with one. Judgment. Smith & Dickson, Attorneys for Deft. P. S. & N. R. R. Co. Office & Post Office Address, Angelica, N. Y. Filed Erie Co. Clerk's Office Oct. 26, 1905. at 2:00 p. m.

56 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

On reading the annexed affidavits of Frederick H. Mollenhauer, C. Walter Artz, Henry S. Hastings, Frederick H. Ridgway, Alexander Munro and Edward Donnelly and the summons and complaint in this action, and the petition for removal and on all the proceedings herein, it is now on motion of C. Walter Artz, attorney specially appearing herein on behalf of the defendant The Interior Construction & Improvement Company, for the sole purpose of applying to this Court for an order setting aside the summons in this action and the service thereof on the Secretary of the State of New York, stated to have been made as specified in said affidavit of C. Walter Artz;

Ordered that said Lathrop, Shea & Henwood Company or its attorneys show cause before this Court at the United States Court House in the City of Buffalo, New York on the 14th day of February, 1905, at 2 o'clock in the afternoon or as soon thereafter as counsel can be heard, why the said summons and the service thereof on the Secretary of State of the State of New York, as upon said defendant The Interior Construction & Improvement Company should not be set aside and declared null and void and such other and further relief granted said defendant, as may be just and proper; in the meanwhile, let all proceedings herein by plaintiff be and they hereby are stayed, and it is;

57 Further ordered that the time of the said defendant The Interior Construction & Improvement Company to enter a general appearance in the above action in this Court and answer, demur or plead to the complaint herein, or to make such motion or to take such further action with respect thereto as it may be advised, be and it is hereby extended for a period of twenty days after the hearing and determination of said application to set aside the summons in this action and the service thereof, as aforesaid and the entry and service of such order as may be made by the Court thereupon and it is;

Further ordered that service of a copy of this order to show cause and the papers on which the same is granted on said plaintiff or its attorneys, on or before the 9th day of February, 1905, shall be deemed good and sufficient service thereof.

Dated February 8th 1905.

JOHN R. HAZEL,
*U. S. J.*

58 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

CITY, STATE, AND COUNTY OF NEW YORK, *ss:*

Frederic H. Mollenhauer being duly sworn deposes and says:

One. That he resides and for more than seven years has continuously resided in the City of New York, and had an office therein.

Two. That until the revocation of his consent as hereinafter mentioned he was designated under the Statute, by The Interior Construction & Improvement Company, a stock corporation organized and existing under and by virtue of the laws of the State of New Jersey, as the person upon whom process against the said corporation, might be served within the State of New York.

Third. That on the 10th day of November, 1904, he made and executed and on the 14th day of November, 1904, caused to be filed in the office of the Secretary of State, pursuant to statute, a revocation of his consent to said designation, copy of which revocation is hereto annexed marked Exhibit "A".

Deponent further says that he has seen a letter, copy of which is hereto annexed marked Exhibit "B," signed by the Secretary of State to the effect that the said revocation was duly filed in the office of the Secretary of State on said 14th day of November, 1904.

59 Fourth. That before the said 10th day of November, 1904, the said corporation The Interior Construction & Improvement Company, ceased to do business within the State of New York and removed therefrom and has not since such removal and cessation to do business maintained any office or place of business within this State but has maintained and maintains now such office and place of business in the City of Detroit, State of Michigan, and has ever since done business in said City and State.

FREDERIC H. MOLLENHAUER.

Sworn to before me this 6th day of February, 1905.

[SEAL.]

C. C. LEEDS,
*Notary Public, N. Y. Co.*

60 EXHIBIT A.

Pursuant to the provisions of Section 16 of General Corporation Law of the State of New York, and Section 432 of the Code of Civil Proceedure of said State, I, Frederic H. Mollenhauer, of the City of New York, in the State of New York, heretofore designated by The Interior Construction & Improvement Company, a stock corporation organized and existing under and by virtue of the laws of the State of New Jersey, as the person upon whom process against the said corporation may be served within the State of New York, do hereby certify as follows:

That my consent to such designation by said corporation was annexed to the designation made by said corporation, and duly filed in the office of the Secretary of State of the State of New York.

That said corporation, The Interior Construction & Improvement Company, has ceased to do business within this State.

That I hereby revoke my said consent to the designation so made by said corporation, as the person upon whom process against the said corporation may be served within the State of New York.

FREDERIC H. MOLLENHAUER.

STATE OF NEW YORK, *County of New York, ss:*

On this 10th day of November, 1904, before me personally appeared Frederic H. Mollenhauer, to me known, and known to me to be the same person described in and who signed the foregoing instrument, and he duly acknowledged to me that he signed and executed the same for the uses and purposes therein mentioned.

C. C. LEEDS, [SEAL.]
*Notary Public, N. Y. Co.*

61 EXHIBIT B.

STATE OF NEW YORK:

OFFICE OF THE SECRETARY OF STATE.
ALBANY, *Nov.* 14, 1904.

Interior Construction & Improvement Company, 45 Wall Street, N. Y. City.

GENTLEMEN: Mr. Frederic H. Mollenhauer, the person designated by your Company as a person upon whom process against the said corporation may be served, has this day filed his revocation in this office.

Respectfully yours,

JOHN F. O'BRIEN,
*Secretary of State.*

62 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

CITY, STATE, AND COUNTY OF NEW YORK, *ss:*

C. Walter Artz being duly sworn deposes and says:

That he resides in the City of New York, having an office at No. 52 Broadway in said City; that he is counsel for the defendant The Interior Construction & Improvement Company herein, for the purpose only of moving to set aside the service of the summons entitled in the Supreme Court of the State of New York, County of Erie and signed by Bushnell & Metcalf, attorneys for plaintiff, of Buffalo, New York served together with complaint upon the Secretary of State, for the defendant The Interior Construction & Improvement Company herein on the 16th day of November, 1904, at the suit of Lathrop, Shea & Henwood Company plaintiff against The Pittsburg, Shawmut & Northern Railroad Company and The Interior Construction & Improvement Company, defendants, on the ground that said service was improper and invalid for the reasons among others that said defendant, The Interior Construction & Improvement Company had ceased to do business and removed its office from this state before the attempted service of said summons; that after said corporation had removed its office from this State and ceased to do business therein and before said attempted service the said Frederic H. Mollenhauer, the person heretofore designated as a person upon whom summons and other process might be served within this State, had duly made, executed and filed his revocation of consent,

63 and that no other designation was thereafter made; and that the conditions under which service may be made upon the Secretary of State provided for by Section 16 of the General Corporation Law of the State of New York, to wit: The death or removal of the person designated from the place where the corporation has its principal place of business within the State, do not exist in this case and there is no ground upon which service may be made upon the Secretary of State as upon said defendant The Interior Construction & Improvement Company.

Deponent further says that no general appearance or answer has been served in this cause on behalf of said The Interior Construction & Improvement Company but that an application was made to said Supreme Court at Special Term in said County of Erie on December 6, 1904, upon the return of an order to show cause, deponent appearing specially for purposes of motion only, to set aside said service of summons upon said Secretary of State; that said motion was denied without opinion by order entered December 7, 1904, and upon appeal to the Appellate Division of said Supreme Court said order was affirmed without opinion and deponent is advised that an

application for leave to appeal to the Court of Appeals submitted by him on January 23rd, 1905, has been denied. Deponent submits herewith a copy of the record upon which said appeal to the Appellate Division was heard. That the time of said The Interior Construction & Improvement Company to appear and plead has been extended by order and stipulation so that the same will not expire until ten days from the service of said order denying motion for leave to appeal to the Court of Appeals which said order has not yet been served; that this cause was on the 6th day of February, 1905 removed from said New York Supreme Court to this Court on the petition of said The Interior Construction & Improvement Company upon the ground of a separable controversy as to said defendant.

That in view of the condition of this cause and the possibility
64 of said The Interior Construction & Improvement Company suffering a default in general appearance pending the determination of the motion hereon an order to show cause why said service of summons should not be set aside and that the time of said defendant to enter general appearance in this action and plead to the complaint therein be extended until ten days after the final determination of this motion and the service of an order denying the same in case such order be made, is asked.

That this cause is not at issue and that no previous application for an order to show cause why said service should not be set aside has been made to this Court and to no other Court except as above stated.

C. WALTER ARTZ.

Sworn to before me this 6th day of February, 1905.
MURRAY BRUCE,
*Notary Public* #136, *Kings County, N. Y.*

Certificate filed in New York County, N. Y.

65 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF PENNSYLVANIA, *County of Elk, ss:*

Henry S. Hastings, being duly sworn says, that he is above the age of twenty-one (21) years, and is employed at St. Mary's, Pennsylvania, that he was the general agent of the defendant the Interior Construction and Improvement Company, until his resignation, Dec. 28, 1904; that the Interior Construction and Improvement Company was organized pursuant to the laws of the state of New Jersey about the year 1889, for the purpose of doing a general contracting and construction business; that the said company soon after its incorporation did the necessary work for bringing natural

gas to the City of Detroit from the gas fields of the State of Ohio; that subsequently, and about the year 1891, the said Construction Company entered into contracts for, and did a large amount of the construction work necessary to, the building of the Allegheny & Kinzua Railroad in McKean County, Pennsylvania; that subsequently the said Construction Company entered into a contract for the construction of the railroad of the Pittsburg, Shawmut & Northern Railroad Company in the States of New York and Pennsylvania; that the said Construction Company on or about the first day of June, 1902, entered into sub-contracts for the construction of portions of the said railroad with the above named plaintiff; that during the years 1902, 1903, and the early part of 1904, work of
66 said construction of said railroad was carried on by the said Construction Company; that during the Summer of 1904, the work of construction of said railroad was practically completed; that on the first day of July, 1904, the said Construction Company surrendered to the said railroad company, all the work upon which it had been engaged; that on the third day of August, 1904, the said Construction Co., ceased absolutely to do or carry on any business within the State of New York; that on or prior to said date, it sold all its plant, machinery and other equipment located within the State of New York, used in the construction of the said railroad; that the said Interior Construction and Improvement Company has not at any time since the said third day of August, 1904, transacted or engaged in any business, either with the Pittsburgh, Shawmut & Northern Railroad Company, or with any other person, firm or corporation, within the State of New York, that the said construction company is not now the owner of, and has not had in its possession, since the third day of August, 1904, any property within the State of New York.

Deponent further states that the Interior Construction and Improvement Company has an office at Passaic, New Jersey that it also has a general office at Detroit, Michigan, that the President of said construction company is John C. Donnelly, who resides at Detroit, Michigan; that it has no Vice President; that the Treasurer and Secretary are Daniel Armstrong and Alexander Munro respectively who reside at Detroit, Michigan; that deponent until Dec 28, 1904 was the General Agent; that the said Construction Company has no office or officers within the State of New York.

HENRY S. HASTINGS.

Sworn to before me this 4th day of February, 1905.

[SEAL.] G. F. KINSELLA,
*Notary Public.*

Commission expires Jan'y 19, 1907.

67 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Frederic H. Ridgway being duly sworn deposes and says: That he resides in the City of New York and is the Private Secretary of John Byrne, the chairman of the Board of Directors of the Pittsburg, Shawmut & Northern Railroad Company; that said John Byrne as such chairman, has a suite of offices at No. 45 Wall Street; New York City; that up to the time when The Interior Construction & Improvement Company ceased to do business in the State of New York, which was before the 10th day of November, 1904, to wit, the 3rd day of August, 1904, said Interior Construction & Improvement Company had an office in the suite occupied by said John Byrne; that there is in the Public Hall in said building a public directory or bulletin, upon which the names of the tenants are painted in large letters; that there is also in the public hall of said building a small paste-board card with printed names thereon showing the tenants in the building, which names are arranged alphabetically; that said pasteboard card is within a frame behind a glass case inaccessible to anyone except those having charge thereof; that the tenants in the building have a right, at their own expense, to have printed upon the large bulletin board in the hall, such names and make such erasures thereon as they desire; that they also have the right to have printed, at their own expense, upon
68 their own doors such names or to make such erasures thereon, as they desire; that the tenants have no access whatever to the printed pasteboard card mentioned above, and that changes thereon are made only by those having charge of the same; that the name of the Interior Construction & Improvement Company has not been upon the large printed directory or bulletin in the public hall of said building for a long time, namely, for a period of two years or thereabouts; that the name of the Interior Construction & Improvement Company was not upon the door of the suite of offices occupied by the said John Byrne at the time of service of the summons herein nor previous thereto since the 3rd day of August, 1904, when the Interior Construction & Improvement Company ceased to do business within this State, that the name of The Interior Construction & Improvement Company did appear on said pasteboard mentioned aforesaid, at the time of the service of this summons and so appears at the present time; that deponent as private Secretary of said John Byrne, many times previous to the summons herein, after said Interior Construction & Improvement Company had ceased to do business within this State, made an application and gave a positive direction to the parties having charge of said pasteboard

bulletin, to have the name of The Interior Construction & Improvement Company removed therefrom; that they wholly failed and neglected to remove the same therefrom although requested by deponent and directed arbitrarily to do so; that there not only remains the name of the Interior Construction & Improvement Company upon the pasteboard bulletin but there also remains the names of a large number of other tenants which have been gone from said building, to deponent's own knowledge for long periods of time running back in one instance for a period of three years; that the parties in charge of said pasteboard bulletin apparently make no effort to keep the same correct or authoritative and not only neglect the same but when requested to make changes thereon wholly
69 fail to do so; that as Private Secretary of said John Byrne deponent knows that the said Interior Construction & Improvement Company removed its office from No. 45 Wall street, upon the 3rd day of August, 1904, and is informed and believes from correspondence in his possession, that its present place of business and office is at Detroit, Michigan, and that it removed its office to Detroit, Michigan on the date of its removal from 45 Wall street, and that since said date it has had no other place of business within this State.

That the contract for telephone service still remains in the name of said Construction Company, having been made some years ago on very favorable terms, through the friendship of the then Treasurer of the Construction Company with the New York Telephone Company, and deponent has not disturbed the contract principally for that reason, wishing to let it run along until the expiration period, which will be very shortly. However, the Railroad Company is a party to that contract in so far as it relates to additional wiring and instruments, as well as insertion of names in the telephone book, and deponent further states that long prior to the Construction Company giving up its office here the payments for the bills rendered were all made by the Pittsburg, Shawmut & Northern R. R. Co. and Major John Byrne.

FREDERIC H. RIDGWAY.

Sworn to before me this 6th day of February 1905.

FREDERIC W. FROST,
*Notary Public, Kings Co.*

Certified in New York Co.

70 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF MICHIGAN, *County of Wayne, ss:*

Alexander Munro, being duly sworn, deposes and says that he is Secretary of the Interior Construction and Improvement Company,

a New Jersey Corporation, and that he attended a meeting of the Board of Directors of said Corporation, held at the City of Detroit, on the 4th day of August, A. D., 1904, at which meeting a motion was offered and adopted, authorizing and directing the removal of the office of said company from the City of New York to the City of Detroit. That the said motion, as the same appears upon the records of said company, is in words and figures as follows, to wit:

"Director Munro moved that the branch office of the company heretofore located at number 45 Wall Street, in the city of New York, be moved from said place to number 33 Peninsular Savings Bank Building, in the city of Detroit, Michigan, which motion being duly supported by Director Armstrong, was put to vote by the chair, and unanimously carried."

And further deponent says not.

ALEXANDER MUNRO.

Subscribed and sworn to before me this fourth day of February, A. D., 1905.

[SEAL.] HORACE H. RACKHAM,
*Notary Public Wayne County Michigan.*

My Commission — Nov. 6, 1905.

71 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF MICHIGAN, *County of Wayne, ss:*

Edward Donnelly being duly sworn says that he is a resident of the City of Detroit, State of Michigan and is the President of The Interior Construction & Improvement Company above named, a corporation of the State of New Jersey, and has been such since August 4th, 1904: That deponent is familiar with the business and affairs of said Company and that it has not done any business in the State of New York or owned any property therein since said August 4th, 1904.

EDWARD DONNELLY.

Subscribed and sworn to before me this Sixth day of February, 1905.

[SEAL.] HORACE H. RACKHAM,
*Notary Public Wayne County, Michigan.*

My Commission expires Nov. 6, 1905.

72 Endorsed: U. S. Circuit Court, Western District of New York.—Lathrop, Shea & Henwood Co., Plaintiff,—against

The Interior Construction & Improvement Co. and another. Order to Show Cause and Affidavits.—C. Walter Artz, Attorney for I. C. & I Co. specially appearing for purposes of motion only. 52 Broadway, Manhattan Borough, New York City.—Service of a copy of the within is hereby admitted this 9th day of February, 1905. Bushnell & Metcalf.—U. S. Circuit Court, Western dist. of N. Y. Filed Feb. 14, 1905. Harris S. Williams, Clerk.

73 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff.
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

CITY, STATE, AND COUNTY OF NEW YORK, *ss:*

C. Walter Artz, being duly sworn, deposes and says: that he resides in the City of New York, having an office at No. 52 Broadway in said City; that he is counsel for the defendant The Interior Construction & Improvement Company herein, for the purpose only of moving to set aside the service of the summons entitled in the Supreme Court of the State of New York, County of Erie, and signed by Bushnell & Metcalf, attorneys for plaintiff, of Buffalo, New York, served together with complaint, upon the Secretary of State, for the defendant The Interior Construction & Improvement Company herein on the 16th day of November, 1904, at the suit of Lathrop, Shea & Henwood Company, Plaintiff, against The Pittsburg, Shawmut & Northern Railroad Company and The Interior Construction & Improvement Company, defendants, on the ground that said service was improper and invalid, for the reason, among others, that said defendant, The Interior Construction & Improvement Company, had ceased to do business and removed its office from this State before the attempted service of said summons; that after said corporation had removed its office from this State and ceased to do business therein and before said attempted service, the said Fred-
74 eric H. Mollenhauer, the person heretofore designated as a person upon whom summons and other process might be served within this State, had duly made, executed and filed his revocation of consent, and that no other designation was thereafter made; and that the conditions under which service may be made on the Secretary of State, provided by Section 16 of the General Corporation Law of the State of New York, to wit: the death or removal of the person designated from the place where the corporation has its principal place of business within the State, do not exist in this case, and there is no ground upon which service may be made upon the Secretary of State as upon said defendant The Interior Construction & Improvement Company.

Deponent further says that no general appearance or answer has been served in this cause on behalf of said The Interior Construction & Improvement Company, but that an application was made to

said Supreme Court at Special Term in said County of Erie on December 6, 1904, upon the return of an order to show cause, deponent appearing specially for the purposes of motion only, to set aside said service of summons upon said Secretary of State; that said motion was denied without opinion by order entered December 7, 1904, and upon appeal to the Appellate Division of said Supreme Court, said order was affirmed without opinion and an application for leave to appeal to the Court of Appeals submitted by him on January 23rd, 1905, has been denied. Deponent submits herewith a copy of the record upon which said appeal to the Appellate Division was heard.

That thereafter and on the 6th day of February, 1905, this cause was removed from said New York Supreme Court to this Court on the petition of The Interior Construction & Improvement Company, upon the ground of the existence of a separable controversy
75 as to said defendant.

That thereafter and on or about the 6th day of March, 1905, a motion to remand was granted by this Court upon the ground that no separable controversy existed.

That thereafter an application was made by said Construction Company before the State Court for an extension of time within which to appear and answer or otherwise plead until the plaintiff should have exercised its election to hold the Construction Company alone liable upon the theory that a judgment could not be taken both against the principal and against the agent sued under the form adopted in the complaint herein. That said motion was denied and the case proceeded to trial upon the answer of the Railroad Company which had been already filed. That such trial was conducted before a Referee and proceeded from time to time. That said trial has been finished, resulting in the dismissal of the complaint as against said Railroad Company but that the plaintiff claiming that the Construction Company was in default, theretofore entered up judgment against it in the State Court by default on the 27th day of September, 1905, for the sum of $47,363.15. That thereupon an application was made on behalf of said Railroad Company for the dismissal of the complaint as against the Railroad Company upon the ground that the plaintiff had exercised its election to hold only the Construction Company and that said motion was granted and judgment of dismissal entered on the 26th day of October, 1905, and thereupon said case became and is now a cause pending only between the Lathrop, Shea & Henwood Company as plaintiff and the said The Interior Construction & Improvement Company as sole defendant, and said cause therefore became and now is removable upon the ground that while said Lathrop, Shea & Henwood Company is a corporation organized and existing under the laws of the State of New York, said Interior Construction & Improvement Com-
76 pany is a corporation and citizen of the State of New Jersey.

Deponent further says that on the hearing of the motion to remand this cause, upon the prior removal thereof, a motion to set aside service of summons upon the Secretary of State was also argued and that, inasmuch as this Court found that no separable contro-

versy existed, the basis of said removal failed and an order was entered denying the motion to set aside the service. But deponent verily believes that this Court did not and could not legally pass upon the merits of said motion to set aside the service, in view of the position that it took in remanding the cause, but that said motion is now open to this defendant to the same extent as upon the former application.

That said Construction Company has never appeared generally or pleaded in this action, but has only and in every event appeared specially for purposes of the specific motion pending and, as deponent verily believes, has in no way prejudiced its right to raise the question of jurisdiction at this time.

That no previous application for an order to show cause why said service should not be set aside has been made to this or any Court, except as above stated.

C. WALTER ARTZ.

Sworn to before me this 31st day of October, 1905.

FREDERICK W. FROST,
*Notary Public Kings Co.*

Cert. filed in New York Co.

U. S. Circuit Court, Western dist. of N. Y. Filed Nov. 9, 1905. Harris S. Williams, Clerk.

77 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendant.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

C. Walter Artz, being duly sworn, says: That he is the attorney for the plaintiff specially appearing herein for purposes of motion only; that he has read the affidavit of J. H. Metcalf, verified herein on the 8th day of November, 1905; that as stated in said affidavit, deponent was not present when the motion for a non-suit at the trial of the action before Hon. Charles B. Wheeler, Referee, was made, but that deponent understood from communications had with attorneys and counsel for the Pittsburgh, Shawmut & Northern Railroad Company, that said Company would take the position that an election had been exercised by the plaintiff in entering up judgment against the Construction Company, and that therefore, a motion based upon that ground would be made to the Referee and deponent was subsequently informed that a motion to dismiss had been granted and understood that said motion had been granted upon the ground stated in his affidavit.

78 Deponent has since the argument of this motion, examined the minutes of the trial before said Referee and calls the

attention of this Court to the following statements made by said J. H. Metcalf, counsel for the plaintiff, in his opening before said Referee:

(Steno's Min. p. 23:)

"They (the Construction Company) then (after the remand of the cause) appeared in Special Term and made a motion to extend the time to answer until after the trial of this issue upon the ground that if they were compelled to come in and try this case now, it would mean two trials, and that, if, *as we claimed, the Railroad Company is the principal and the Construction Company is the agent, that, of course, we cannot recover of both for the same cause of action.* We agree to that. *We do not ask pay from both of them but we seek to hold the Railroad Company.*"

(Steno's Min. p. 40:)

"If the facts and circumstances which we disclose by our proofs wholly fail to show that there was that connection with (between?) them, that one was an independent contractor from the other and independent not only by word but in actual form and fact that they were different and separate Companies. Of course, they may be separate Companies and there is an independent entity there just as though you and Mr. Thornton both should make an arrangement with me; you would be entirely different persons. There is nothing in the fact that you are joined together in a transaction that attempts to make you one nor are there any facts alleged here by which we attempt to make both these defendants a single individual or a single party. *And I suppose the time will come when we will have to elect which of these defendants we propose to hold liable here.* When the time comes if it does come, if Brother Ayers (Artz) and the Construction Company get into Court and we are compelled to make an election, then after they are in Court and litigating this matter, then is the time when we will have to elect. Until that time, we have a right to prosecute this action against this defendant who has been served and who has appeared and who has answered and who has come here for trial."

79 (Steno's Min. p. 47:)

"Mr. DICKSON: Will the Referee pardon me a moment. I noticed Mr. Metcalf referred to the statements, various statements which he makes, claiming that he has charged causes of action against the defendants, a joint cause of action. I noticed he emphasized that. That being true or assuming that to be true from his statement, yet he makes a succeeding statement that he must at some time elect. *If this is a joint cause of action, he is not compelled to elect, cannot be compelled to elect and consequently my friend's statements are not exactly in harmony.*

Mr. METCALF: Well, that is true, Mr. Dickson. I did not mean to *to* say just exactly what you stated, literally. *It is not a joint liability. It is a several liability.*

Deponent further says that at the time the statements above referred to were made, to wit, on or about the 25th day of May, 1905, no judgment had been entered against the Construction Company and that such judgment was not entered until September 27, 1905.

after a Receiver of the Railroad had been appointed in foreclosure proceedings in this State and the State of Pennsylvania.

C. WALTER ARTZ.

Sworn to before me this 23rd day of November, 1905.

ROBERT KELLY PRENTICE,
*Notary Public* #79, *New York County.*

Endorsed: U. S. Circuit Court, Western District N. Y. Lathrop, Shea & Henwood Co., Plaintiff, *against* Pittsburg, Shawmut & Northern Railroad Company and The Interior Construction & Improvement Company, Defendant. Affidavit. C. Walter Artz, of Counsel for I. C. & I. Co. specifically appearing for purposes of motion only. 52 Broadway, Borough of Manhattan, New York City. U. S. Circuit Court, Western dist. of N. Y. Filed Dec. 27, 1905. Harris S. Williams, Clerk.

80 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
Defendant.

On reading the annexed affidavit of C. Walter Artz and the affidavits of Frederick H. Mollenhauer, C. Walter Artz, Henry S. Hastings, Frederick H. Ridgeway, Alexander Munro and Edward Donnelly, heretofore filed in this Court on former motions to set aside services and the summons and complaint in said action, and the petition for removal and on all proceedings herein, it is now, on motion of C. Walter Artz, attorney specially appearing herein on behalf of the defendant The Interior Construction & Improvement Company, for the sole purpose of applying to this Court for an order setting aside the summons in this action and the service thereof on the Secretary of the State of New York and vacating the judgment stated to have been entered thereon against said The Interior Construction & Improvement Company, as specified in the affidavit of C. Walter Artz, verified October 31, 1905.

Ordered that said Lathrop, Shea & Henwood Company, or its attorneys, show cause before this Court at the United States Court House in the City of Buffalo, New York on the 18 day of Dec. 1906, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said summons and the service thereof on the
81 Secretary of State of the State of New York, as upon said defendant The Interior Construction & Improvement Company should not be set aside and declared null and void, the judgment entered thereon vacated, and such other and further relief granted said defendant as may be just and proper; and in the meanwhile let all proceedings herein by plaintiff under said judgment be, and they hereby are, stayed; and it is

Further ordered that service of a copy of this order to show cause and the annexed affidavit on which the same is granted, made personally or by mail, on said plaintiff or its attorneys, on or before the 5th day of December 1906, shall be deemed good and sufficient service thereof.

Dated December 4th, 1906.

JOHN R. HAZEL, *U. S. J.*

United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
Defendant.

WESTERN DISTRICT OF NEW YORK, *County of Erie, ss:*

C. Walter Artz, being duly sworn, deposes and says: that he resides in the City of New York, having an office at No. 52 Broadway in said City; that he is counsel for the defendant The Interior Construction & Improvement Company herein, for the purpose
82 only of moving to set aside the service of the summons entitled in the Supreme Court of the State of New York, County of Erie, and signed by Bushnell and Metcalf, attorneys for the plaintiff, of Buffalo, New York, served, together with the complaint, upon the Secretary of State, for the defendant The Interior Construction & Improvement Company herein on the 16th day of November 1904, at the suit of Lathrop, Shea & Henwood Company plaintiff, against The Pittsburg, Shawmut & Northern Railroad Company, defendants. That in addition to the facts stated in the affidavits submitted herein to which deponent refers, on the motion to set aside service upon the last removal of this cause, deponent states that this action was on the 2nd day of February 1906, remended to the state Court upon the ground that in view of the pendency of an appeal to the Appellate Division of the Supreme Court of the State of New York from the judgment of dismissal as to the Pittsburg, Shawmut & Northern Railroad Company, said removal was premature and this Court held that therefore it was not necessary at that time to pass upon the merits of the motion to set aside service then pending. Deponent further states that since this action was so remanded the appeal above mentioned has been decided by said Appellate Division and that judgment affirming said judgment of dismissal was entered herein this day. That after the entry of said judgment of affirmance this cause was thereupon this day removed to this Court upon the petition of said Construction Company; and no further appeal intervening, as deponent is informed, deponent now asks an order to show cause why said service above mentioned should not be set aside and the alleged default judgment entered thereon vacated. That no previous application for
83 the order now sought has been made.

C. WALTER ARTZ.

Sworn to before me this 4th day of December, 1906.

HARRIS S. WILLIAMS,
*Clerk U. S. Circuit Court, Western District of N. Y.*

Endorsed: U. S. Circuit Court, Western District of New York.—Lathrop, Shea & Henwood Company, Plaintiff, against The Interior Construction & Improvement Company, Defendant.—Order to show cause and affidavit.—C. Walter Artz, Attorney for the I. C. & I. Co. specially appearing for purposes of removal only. 52 Broadway, New York City.—Service of within order and affidavit is hereby admitted Dec. 4, '06. Bushnell & Metcalf.—U. S. Circuit Court, Western dist. of N. Y. Filed Dec. 27, 1906. Harris S. Williams, Clerk.

84 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

J. H. Metcalf being duly sworn deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, and has had full charge and management of said action and is familiar with all the facts and circumstances connected therewith. That this action was brought in the Supreme Court of the State of New York, Erie County, against the said defendant and The Pittsburg, Shawmut & Northern Railroad Company by the personal service of the summons and complaint upon The Pittsburg, Shawmut & Northern Railroad Company on or about the 6th day of September, 1904, and the substituted service of the summons and complaint upon the defendant The Interior Construction & Improvement Company on the 16th day of November, 1904, by serving the same upon the Secretary of State of the State of New York, as provided by Section 16 of the General Corporation Law of the State of New York.

That the defendant The Pittsburg, Shawmut & Northern Railroad Company duly appeared in said action and served its answer to the plaintiff's complaint and the issues so joined were thereafter,
85 by an order duly made and entered in said Court, referred to Charles B. Wheeler, a Referee to hear try and determine the same. That the said action came on for trial before said Referee and on the 26th day of October, 1905, after Plaintiff had rested its case, the defendant moved for a non-suit which was granted and judgment dismissing the plaintiff's complaint was thereupon entered and on the 27th day of October, 1905, the plaintiff herein duly filed in the office of the Clerk of Erie County and served upon the attorneys for the said defendant The Pittsburg, Shawmut & Northern Railroad Company, exceptions to the said Referee's report and notice of appeal to the Appellate Division of the Fourth Judicial Depart-

ment of said Supreme Court; that said appeal is now pending and undetermined in said Court.

That on the 2nd day of December, 1904, the defendant herein, The Interior Construction & Improvement Company appeared specially in this action by C. Walter Artz its attorney and moved to set aside the substituted service of the summons herein upon the said defendant, which motion was returnable at a special term of the Supreme Court, held on the 7th day of November, 1904; that said motion was then heard and denied with $10.00 costs. That said dedefendant The Interior Construction & Improvement Company, appealed from said order to the Appellate Division of the Supreme Court. That the appeal was heard at the term beginning on the third day of January, 1905, and the order appealed from duly affirmed by said Court and the order of affirmance served upon the defendant's attorney on the 17th day of January, 1905. That on the 19th day of January, 1905, said defendant moved said Appellate Division for leave to appeal to the Court of Appeals which motion was on the 27th day of January, 1905, denied by said Appellate Division. That on
the 6th day of February, 1905, said defendant by petition,
86 made by C. Walter Artz, specially appearing for the defendant for the purpose of presenting said petition, moved said cause from the Supreme Court of the State of New York to the United States Circuit Court for the Western District of New York, on the ground of a separable controversy; that on the 9th day of February, 1905, this defendant, by C. Walter Artz specially appearing for the sole purpose of said motion, obtained an order to show cause granted by Hon. John R. Hazel, United States Judge, requiring the plaintiff to show cause before said United States Court on the 14th day of February, 1905, why the service of the summons upon the defendant should not be set aside as it was irregular and void; that on the 11th day of February, 1905, deponent obtained from Judge Hazel, an order returnable on the 14th day of February, 1905, at the time of the return of the said defendant's motion, requiring said defendant to show cause why the said case should not be remanded to the State Court, as the same was not properly moved to this Court. That on the 6th day of March, 1905, Judge Hazel filed a decision and opinion granting this plaintiff's motion to remand this cause to the said court, and denying the defendant's motion to dismiss the substituted service of process. That dependent begs leave to refer to the written opinion and decision of Judge Hazel, which was then filed.

That on the 27th day of March, 1905, this defendant by C. Walter Artz, appearing specially for the purposes of said motion, obtained an order requiring the plaintiff to show cause before special term of the Supreme Court, of the State of New York, to be held on the 27th day of March 1905, at four o'clock in the afternoon "why the time of the defendant The Interior Construction & Improvement Company to appear and answer or otherwise plead herein, should not be
extended until twenty days after the determination of the
87 motion now pending at a trial term of said Court, that the complaint of the plaintiff be dismissed as to the defendant

The Pittsburg, Shawmut & Northern Railroad Company, or the plaintiff be compelled to proceed against either of the defendants herein to the exclusion of the other and in case said motion to dismiss or compel an election be in all respects denied, why the time of the defendant The Interior Construction & Improvement Company to appear and answer or otherwise plead should not be extended until twenty days after the entry of the judgment upon the trial of said cause as to the defendant The Pittsburg, Shawmut & Northern Railroad Company."

That on the return of said order to show cause the same was duly continued until the 31st day of March and then argued before Judge Kenefick and on the 4th day of April, 1905, the said motion was denied with Ten dollars ($10.00) costs, and a copy of the order was on the 6th day of April, 1905, duly served upon the said C. Walter Artz, attorney for said defendant, as appears by the affidavit of service now in possession of deponent; that the costs awarded by said order have never been paid by the said defendant.

That on the 25th day of September, 1905, the plaintiff herein applied to the Supreme Court of the State of New York upon an affidavit of deponent setting forth all of the facts as to the service of the summons and complaint herein upon the defendant The Interior Construction & Improvement Company, and of all the proceedings had herein and showing said defendant was in default and had not appeared herein or served any answer or demurrer to the plaintiff's complaint, and more than twenty days had elapsed since the service of said summons and complaint upon it as aforesaid, and the said Supreme Court at a special term thereof on said date, duly
88 appointed William H. Means, Esq., a Referee, to take proof of the cause of action set forth in the plaintiff's complaint and to examine the plaintiff or his attorney or agent on oath, respecting any payments made to the plaintiff or to any one for its use and properly applicable upon the amount claimed to be due the plaintiff in said complaint; that such proceedings were afterwards had before the said Referee and proofs to sustain the cause of action set forth in the plaintiff's complaint were then and there duly made and the said Referee did on the 27th day of September, 1905, duly make his report which was by an order duly granted by said Court on said date confirmed and judgment was then and there ordered to be entered in favor of the plaintiff and against the defendant The Interior Construction & Improvement Company for the sum of $47,323.91, and on said date judgment was duly entered in the office of the Clerk of the County of Erie for said sum of $47,323.91 and $39.24 costs, and disbursements then duly taxed by the Clerk, amounting in all to $47,363.15; that thereafter an execution was duly issued to the Sheriff of New York County where the said defendant last had a general office and place of business within the State of New York, and said execution was duly returned by said Sheriff to the office of the Clerk of the County of Erie on the 4th day of October, 1905, wholly unsatisfied and unpaid.

That on the 30th day of October, 1905, deponent was served with a copy of a petition in this action made by "C. Walter Artz attorney

for petitioner, specially appearing for the sole purpose of presenting this petition" asking for the removal of this cause from the Supreme Court of the State of New York to the Circuit of the United States for the Western District of New York; that accompanying said petition was a copy of a bond executed by the defendant The Interior Construction & Improvement Company and by the Fidelity
89 and Deposit Company of Maryland, and approved by Truman C. White, Justice of the Supreme Court, on the 30th day of October, but no order directing the removal of said cause to this Court was served upon deponent.

That on the first day of November, 1905, deponent was served with a copy of an affidavit and order requiring the plaintiff to show cause before a term of this Court to be held at the City of Buffalo on the 9th day of November, 1905, why the service of the summons upon the Secretary of State as upon said defendant The Interior Construction & Improvement Company should not be set aside and declared null and void and the judgment entered thereon vacated, and staying all proceedings by the plaintiff under said judgment until the decision of said motion.

That deponent therefore asks that an order may be granted herein requiring the defendant The Interior Construction & Improvement Company to show cause why the proceedings taken by the said defendant in removing this cause to this Court should not be vacated and the cause remanded to the State Court of the State of New York, upon the ground that the proceedings for the removal of the same to this Court are irregular, illegal and void.

That no previous application for an order to show cause has been made herein, and the reason this order is asked is plaintiff will not be able to give eight days' service of this motion.

J. M. METCALF.

Sworn to before me this 1st day of Nov., 1905.

GEORGE H. SELLERS,
*Notary Public, Erie County.*

90 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK,
*County of Erie, City of Buffalo, ss:*

J. H Metcalf being duly sworn deposes and says that he is one of the attorneys for the plaintiff in the above entitled action, and has had the full charge and management of this action and all proceedings had therein pertaining to the effort of the defendant the In-

terior Construction & Improvement Company to set aside the service of the summons and complaint upon the Secretary of the State of New York, and of the appeal from the said order denying said defendant's motion. That this action was brought on the 24th day of October 1904, by the personal service of the summons and complaint upon the defendant the Pittsburg, Shawmut & Northern Railroad Company which defendant has appeared and answered herein, and this cause of action is now at issue between the plaintiff and the defendant the Pittsburg, Shawmut and Northern Railroad Company.

That the facts stated in the affidavit of C. Walter Artz as to the status of this action is truly and correctly stated except that deponent is informed that since the service of the order to show cause and affidavits herein, a copy of a certified copy of the order of the Appellate Division of the Fourth Department denying the defendant's motion for leave to appeal to the Court of Appeals has
91 been served on the said C. Walter Artz, as attorney for said Interior Construction & Improvement Company and defendant's time to answer under a stipulation given by deponent is ten days from the service of said order so denying their motion. That the delay in the service of said order denying said motion was caused wholly on account of the Clerk of the said Appellate Division not returning to deponent the said order so certified, and which was filed by deponent with the said Clerk of the Appellate Division on the 27th day of January, 1905.

That deponent has read the copy of the petition for the removal of this cause to this Court and of the order herein by the Erie County Special Term on the 6th day of February, 1905, so removing the cause and which right for removal is wholly upon the ground of the diversity of citizenship and which states that the plaintiff and the defendant the Pittsburg Shawmut and Northern Railroad Company are citizens of the State of New York, and that the defendant the Interior Construction and Improvement Company is a citizen of the State of New Jersey.

That the action set forth in the complaint herein is brought to recover of the defendants the sum of $43,038.88, together with interest thereon alleged to be due the plaintiff from the defendant under two certain contracts made and entered into between the defendant the Interior Construction & Improvement Company and the plaintiff for the construction of a portion of the railroad of the defendant the Pittsburg, Shawmut & Northern Railroad Company and under which contracts plaintiff did and performed a large amount of work and expended large and various sums of money. The complaint in said action charges and alleges that the work was so done for the construction of said Pittsburg, Shawmut & Northern Railroad, and "that the officers, directors, promot-
92 ers and owners of said Construction Company and the affairs and management of the said Construction Company was entirely controlled and managed by the said officers, and directors of the said Railroad Company, and in truth and in fact as this plaintiff charges and avers the said Construction Company was but the agent or representative of the said Railroad Company which

was and is responsible and liable for all of the acts and obligations of the said Construction Company in the construction of said railroad."

That plaintiff's right to recover from the Pittsburg, Shawmut & Northern Railroad Company is predicated entirely upon plaintiff's claim that the Interior Construction & Improvement Company was but the agent for the construction of said railroad and that the said Railroad Company had and derived the full benefit and profit of the said contracts. That deponent begs leave to refer to the Complaint herein for a more detailed statement of the facts therein contained.

That the petition of the said Interior Construction & Improvement Company states "That this action is of a civil nature at law and that the matter in dispute in the separable controversy hereinafter referred to exceeds exclusive of interests and costs the sum of $2,000.00. That the controversy in this action so far as your petitioner is a defendant or interested in such controversy is wholly between citizens of different states as appears from the complaint, a copy of which is filed herewith as a part hereof."

That deponent denies that the controversy between the plaintiff and the defendant herein is separable or that it is wholly between citizens of different states as the controversy between the Pittsburg, Shawmut & Northern Railroad Company and the Interior Construction and Improvement Company is not separable, and that the plaintiff and the Pittsburg, Shawmut and Northern Railroad Com-
93 pany are both citizens of the State of New York, and that the controversy herein cannot be decided and determined by the trial of the said issues between the plaintiff and the Pittsburg, Shawmut & Northern Railroad Company separately from the trial of the issues between the plaintiff and the Interior Construction and Improvement Company, as appears by the complaint herein and the answer of the defendant the Pittsburg, Shawmut and Northern Railroad Company.

That the facts which it will be necessary for the plaintiff to prove upon the trial of this action and which connect the defendants therewith are so interwoven and inseparable in their character that it will be practically impossible to separate the acts done by the officers of the defendant the Pittsburg, Shawmut & Northern Railroad Company and the officers of the defendant the Interior Construction and Improvement Company. That a large portion of plaintiff's claim is made up for extra work done and materials furnished which were ordered by the officers of the Railroad Company and of the Construction Company and which amounted to $13,819.96 as stated in the complaint. That of this amount over $7000.00 was for work done and materials furnished ordered entirely by the officers of the Railroad Company. That in the negotiations for settlement of the differences between the plaintiff and the defendants which covered a period of several months and numerous interviews, several statements and letters and correspondence passing between the parties hereto, that the items of charges and credits as made be the defendant were in each and every instance

as owing by both of the defendants to the plaintiff and that there was never any claim made, statement or account rendered, in which it was claimed that the said indebtedness was separable or severable in its character or that any part or portion thereof was owing by either of the defendants separately to the plaintiff, but in each
94 of said statements, accounts, letters and correspondence the items of indebtedness are always carried as the indebtedness owing to the plaintiff by the Pittsburg, Shawmut & Northern Railroad Company and the Interior Construction & Improvement Company.

That the officers of the Pittsburg, Shawmut and Northern Railroad Company and the Interior Construction and Improvement Company at the time of the making of the said contracts and of the performance of the same were that John Byrne was President, Lewis F. Wilson, Secretary, Henry S. Hastings, Auditor and M. F. Bonzano, Chief Engineer of the Pittsburg, Shawmut and Northern Railroad Company. That F. P. Byrne, a brother of John Byrne, as deponent is informed, was President, Lewis F. Wilson, Secretary and Henry S. Hastings, General Agent of the Interior Construction & Improvement Company. That Lewis F. Wilson who is the Secretary of both companies verified the answer of the Railroad Company as Secretary and one of the moving affidavits of the Construction Company upon their motion to set aside the service of the summons herein is made by said Henry S. Hastings in which he swears that he was the General Agent of the Construction Company.

That the contracts upon which this action was brought were executed by F. P. Byrne as president of the Interior Construction & Improvement Company, attested by Louis F. Wilson Secretary thereof, and by M. F. Bonzano Chief Engineer of said Railroad Company and throughout the said contracts it directs that the work should be done under the direction, superintendence and charge of the said Chief Engineer of the Railroad Company and all matters of differences and whether the plaintiff had fulfilled its contracts, according to the terms thereof, and the quality of the work
95 done, should be passed upon by the said Chief Engineer of the said Railroad Company.

That one of the items constituting the plaintiff's claim and amounting to over $9,000.00 thereof is for work done by the Interior Construction & Improvement Company under a special agreement with the plaintiff and made and entered into at the special request of the President of the Railroad Company and which the Railroad Company claimed in the negotiations for settlement that it was work which was not holden to pay as it was work which the Construction Company was holden to do for the Railroad Company and not properly chargeable by the plaintiff herein to the Railroad Company.

That the order to show cause which was obtained by the Interior Construction & Improvement Company is returnable before this Court on the 14th day of February 1905 at two o'clock in the afternoon, and that the motion is made by "C. Walter Artz attorney for

the Interior Construction & Improvement Company, specially appearing for the purposes of this motion only," and the petition removing said cause and the order granting said petition are made upon the application and on motion of said "C. Walter Artz attorney for the Interior Construction & Improvement Company specially appearing for the sole purposes of presenting the petition. That deponent believes that said proceedings for the removal of this cause to this Court are entirely irregular as the same cannot be removed unless the action has been regularly commenced and is pending in the State Court of the State of New York and said State Court has full jurisdiction of the said defendant and the Supreme Court of the State of New York has decided upon the motion specially made by the said defendant the Interior Construction & Improvement Company that it has acquired jurisdiction of said Interior Construction & Improvement Company and that service upon the
96 Secretary of the State of New York was good and valid and said defendant cannot appear specially for the purpose of removing said cause, and deponent believes that defendant cannot appear herein specially for the purpose of raising the question of the regularity of the service of the summons and complaint upon said Interior Construction & Improvement Company and that said question has already been decided between the parties hereto by a Court of competent jurisdiction.

Deponent therefore asks that an order may be granted herein requiring the said defendant the Interior Construction and Improvement Company to appear before this Court and show cause at the time of the return of their motion herein why this cause should not be remanded to the State Court and this proceeding brought by the said Interior Construction & Improvement Company set aside and vacated as irregular and void, and that less than eight days' notice of motion herein be allowed so that the whole question as to the right of the said defendant and the regularity of this proceeding may be heard by this Court at the same time. That no previous application has been made for this order.

J. H. METCALF.

Sworn to before me this 11th day of Feb., 1905.

CHARLES G. SIGNOR,
*Notary Public for Orleans Co.*

Certificate filed in Erie Co.

Endorsed: Circuit Court of the U. S.—Western District of N. Y. Lathrop, Shea & Henwood Co. *vs.* Pittsburg, Shawmut & Northern Railroad Company and the Interior Construction and Improvement Company.—Affidavit.—Bushnell & Metcalf.—U. S. Circuit Court, Western dist. of N. Y. Filed Feb. 2, 1906. Harris S. Williams, Clerk.

97 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

STATE OF NEW YORK,
*County of Erie, City of Buffalo, ss:*

J. H. Metcalf being duly sworn says that he is one of the attorneys for the plaintiff in the above entitled action and has had the charge and management of said action since the commencement thereof and is familiar with all the proceedings had therein; that he has read the affidavit of C. Walter Artz, verified the 31st day of October, 1905, and served with an order requiring the plaintiff to show cause why the substituted service of the summons upon the defendant The Interior Construction & Improvement Company should not be set aside and declared null and void, and the judgment entered thereon vacated.

That the statement contained in the affidavit of said C. Walter Artz at folio 9 is as follows:

"That thereupon an application was made on behalf of the said Railroad Company for the dismissal of the complaint as against the Railroad Company upon the ground that the plaintiff had exercised its election to hold only the Construction Company and that said motion was granted and judgment of dismissal entered on the 26th day of October, 1905, and thereupon said case became and now is a cause pending only between the Lathrop Shea & Henwood Company as plaintiff and the said The Interior Construction & Improvement Company as sole defendant, and said cause there-
98 fore became and is now removable upon the ground that while said Lathrop Shea & Henwood Company is a corporation organized and existing under the laws of the State of New York the said The Interior Construction & Improvement Company is a corporation and citizen of the State of New Jersey."

That this statement is not true and correct; that said C. Walter Artz, was not present when said motion for a non suit at the trial of the action before Mr. Charles B. Wheeler, Referee, to whom said action against the Railroad Company was referred, and the motion for a non-suit or dismissal of the complaint of the plaintiff as against the said Railroad Company was not made upon the ground that the plaintiff had exercised its election to hold only the Construction Company, but was made solely upon the ground of the failure of the plaintiff's proof to maintain its action against the Railroad Company.

That on the hearing before said Referee on the 18th of October, 1905, the defendant the Railroad Company asked leave of the Referee to amend its answer by setting up an allegation that plaintiff had entered judgment against The Interior Construction & Improve-

ment Company on the 27th day of September, 1905, and that thereby the plaintiff had elected to proceed against said Construction Company and not against the Railroad Company. That said motion was then denied by the said Referee and thereupon the counsel for said defendant the Railroad Company offered in evidence a certified copy of the judgment Roll in this action showing that judgment was so entered against The Interior Construction & Improvement Company on the 27th day of September, 1905, which said judgment roll was excluded by said Referee. That said proceeding appears upon pages 517-19 of the stenographer's minutes of said trial to which deponent begs leave to refer. That thereupon counsel for the defendant the Railroad Company proceeded with the cross-examination of witnesses for the remainder of that day and all of the 19th of October when the proceedings were ad-
99 journed until the 23rd day of October and the cross examination of another witness was proceeded with by said defendant's counsel during all of the 23rd of October and about adjournment was taken until the following day, the 24th of October; that on the morning of the 24th of October, the following proceedings before said Referee, as appears at pages 738-41, were had:

Mr. DICKSON: The defendant railroad company moves for a nonsuit as to each and every of the alleged causes of action in plaintiff's complaint, upon the following grounds:

First. That plaintiff has failed to prove facts sufficient to constitute a cause of action in any of said alleged causes of action;

Second. That it has failed to prove or establish facts upon which agency between the defendant construction company and the defendant railroad company can be predicated;

Third. That it has failed to establish facts showing that the defendant railroad company has in any way become liable for the acts, obligations or contracts of the defendant construction company;

Fourth. It appears that the plaintiff knew and recognized that the defendants were separate and distinct corporations and that it dealt with them as such;

Fifth. That assuming that if some of the officers of both defendants were common, that that fact does not create the relation of agent and principal, or a liability against the railroad company for the acts or contracts of the construction company;

Sixth. That for all "extra" work it was provided for, in contracts between the construction company and the plaintiff, already in evidence, that such work should receive the approval of the chief engineer of the railroad company under his hand before payment should be allowed the contractor for the I. C. & I. Company. That no such approval has been established as to all and each of said bills for said extra work. That by the contract or contracts in evidence it is provided that *"whenever work is required to be which is not covered by the prices herein mentioned, the Company shall give a written order for the doing of such work, and fix the prices to be paid for the doing of the same. The obtaining of the certificate of the company as to the work done and the price thereof shall be a condition precedent to the right of the contractor to be paid for*

*any such extra work"*; and that it appears that no such certificate was obtained as to any of such bills;

100 Seventh. That it appears that the alleged causes of action 2 and 7, inclusive, are based exclusively upon some alleged contract with conceded representatives of the defendant I. C. & I. Company, and that in no case was the defendant railroad company connected therewith;

Eighth. That it appears the relation of the defendant construction company to the railroad company was that of independent contractor, the railroad company having contracted with the construction company for the construction of its road, which fact was known to the plaintiff when it contracted with the defendant construction company.

The REFEREE: I am inclined to grant this motion. I think I might as well dispose of it now as to go into the defense; it will leave the plaintiff, if I am wrong, where it has the best position that it possibly can have to reverse me, because you are entitled to all the benefits and most favorable construction that might be put upon the evidence. I do not know just what form this decision should take, whether I should make a formal decision or not.

Judge METCALF: You grant it on the ground of failure of proof?

The REFEREE: Failure of proof.

Mr. DICKSON: I suppose that is upon all the grounds we have enumerated in our motion, as far as they apply?

The REFEREE: As far as they apply.

Judge METCALF: I want to enter an exception to the granting of the motion.

Proceeding*d* closed.

That on the 26th day of October, 1905, after the motion of nonsuit was granted, the said defendant the Railroad Company entered judgment in accordance with the decision of said Referee, dismissing the plaintiff's complaint and taxing its costs for $591.92; that thereafter and on the 27th day of October, 1905, the plaintiff herein duly filed in the office of the Clerk of Erie County and served upon the attorneys for the defendant The Pittsburg Shawmut & Northern Railroad Company, exceptions to the report of the said Ref-

101 eree and a notice of appeal to the Appellate Division of the Fourth Judicial Department of the Supreme Court, and this plaintiff's appeal from said judgment is now pending and undetermined in the said Court.

J. H. METCALF.

Sworn to before me this 8th day of Nov., 1905.

GEORGE H. SELLERS,
*Notary Public, Erie County.*

(Endorsed:) Circuit Court of the U. S., Western District of N. Y.—Lathrop Shea & Henwood Co. *vs.* The Interior Construction & Improvement Company.—Affidavit to oppose motion to set aside service of summons.—Bushnell & Metcalf, Attorneys for Plaintiff, 688-694 — Buffalo, N. Y.—U. S. Circuit Court, Western dist. of N. Y. Filed Nov. 9, 1905. Harris S. Williams, Clerk.

102 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

J. H. Metcalf being duly sworn deposes and says that he is one of the attorneys for the plaintiff in the above entitled action and has had the full charge and management of this case since its commencement in September, 1904. That the deponent is familiar with the affidavit of Clarence M. Bushnell verified on the 2nd day of December, 1904, and used at special term in opposition to the motion made by the defendant The Interior Construction & Improvement Company to set aside the service of the summons. That plaintiff submits the said affidavit in opposition to defendant's motion to set aside the service of the summons herein; that a copy of said affidavit appears at page 15 of the printed papers on appeal to the Appellate Division. That in addition to the facts stated in said affidavit as to the Interior Construction & Improvement Company still doing business within the State of New York and maintaining an action against certain contractors with said defendants for the construction of the Pittsburg, Shawmut & Northern Railroad Company, deponent deposes and says:—

That he is advised by J. H. Warren, the attorney for the defendant in said action, who resides at Olean, N. Y. that the
103 action referred to was brought by The Interior Construction & Improvement Company against Winfield McLane and another; that the summons and complaint were served on the 17th day of November, 1903, and the answer was served on the 7th day of December, 1903, and a reply was served on the 15th day of January, 1904. That the venue of said action is laid in the County of Alleghany and plaintiff has repeatedly noticed it for trial and put it upon the calendar for the trial term of said County and same appears upon said calendar as late as the term beginning the 12th day of June, 1905, and that said action is still pending in the Supreme Court of the State of New York.

J. H. METCALF.

Sworn to before me this 16th day of Nov., 1905.
GEORGE H. SELLERS,
*Notary Public.*

Endorsed: Supreme Court, Erie County. Lathrop Shea & Henwood Co. *vs.* The Interior Construction & Improvement Company. Additional affidavit to oppose motion to set aside service of summons. Bushnell & Metcalf, Attorneys for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western dist. of N. Y. Filed Nov. 16, 1905. Harris S. Williams, Clerk.

104 Circuit Court of the United States, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendant.

STATE OF NEW YORK, *County of Erie, ss:*

J. H. Metcalf, being duly sworn, deposes and says: that he is one of the attorneys for the plaintiff in the above entitled action, and has had full charge and management of the same and is familiar with all the steps and proceedings therein.

That plaintiff submits in opposition to the motion of the defendant the original affidavits used to oppose this defendant's motion in the Special Term of the Supreme Court of the State of New York made in November, 1904, to set aside the service of the summons herein, and also the additional affidavit made by J. H. Metcalf, verified the 16th of November, 1905, filed in opposition to the second application made in this Court to set aside the service of the summons, which affidavits, are now on file with the papers in this cause, in the office of the Clerk of this Court.

This plaintiff appears in this motion to set aside the service of the summons upon the defendant, the Interior Construction and Improvement Company, specially only for the purpose of opposing this motion, and by so doing does not waive any of its rights to take such further steps in the State Court herein, or make and institute any other motions or proceedings as this plaintiff may be advised.

105

J. H. METCALF.

Sworn to before me this 26th day of December, 1906.

[SEAL.] JAMES T. DRISCOLL,
*Notary Public, Erie County.*

Endorsed: United States Circuit Court, Western District of New York. Lathrop, Shea & Henwood Co., Plaintiff, *vs.* Interior Construction and Improvement Co. Affidavit to oppose motion to vacate service of summons. Bushnell & Metcalf, Appearing Specially as Attorneys for Plaintiff, Buffalo, N. Y. U. S. Circuit Court, Western dist. of N. Y. Filed Dec. 27, 1906. Harris S. Williams, Clerk.

106 Supreme Court, Appellate Division, Fourth Department.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff-Respondent,
*against*
THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendant-Appellant; Impleaded with Pittsburg, Shawmut and Northern Railroad Company, Defendant.

Papers on Appeal from Order Denying Motion to Set Aside Service Upon Secretary of State.

C. Walter Artz, Attorney for Appellant, specially appearing for purpose only of motion, 52 Broadway, Borough of Manhattan, New York City.
Bushnell & Metcalf, Attorneys for Respondent, Ellicott Square, Buffalo, New York.

107 *Order to Show Cause Read on Behalf of I. C. & I. Co.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

On the Summons in this action and the annexed affidavits of Frederic H. Mollenhauer and C. Walter Artz, verified on the 29th day of November, 1904, and good and sufficient grounds appearing for the granting of an order to show cause returnable in less than eight days, in lieu of the ordinary notice of motion, it is

Ordered that the plaintiff or its attorney show cause before this Court, at a Special Term thereof, to be held at the City Hall in the City of Buffalo, County of Erie, on the 2nd day of December, 1904, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the service of the summons herein on the Secretary of State of the State of New York should not be set aside upon the ground that said service was improper and invalid for the rea-
108 sons among others, that said defendant The Interior Construction & Improvement Company had ceased to do business and removed its office from this State before the attempted service of said summons; that after said corporation had removed its office from this State and ceased to do business herein and before said attempted service the said Frederic H. Mollenhauer, the person heretofore designated as a person upon whom summons and other process might be served within this State, had duly made, executed and filed his revocation, of consent, and that no other designation had thereafter been made; and that conditions under which service may be made upon the secretary of State provided for by Section 16 of the Gen-

eral Corporation Law as amended by Chapter 490 of the Laws of 1904, to wit: the death or removal of the person designated, from the place where the corporation has its principal place of business within the state do not exist in this case and there is no ground upon which service may be made upon the Secretary of State as upon said defendant The Interior Construction & Improvement Company.

Ordered further that the service of this order upon the attorneys for the plaintiff on or before November 30th be sufficient.

Dated this 30th day of November, 1904.

FREDERICK W. KRUSE,
*J. S. C.*

109 *Affidavit of Frederic H. Mollenhauer Read on Behalf of I. C. & I. Co.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

CITY, STATE, AND COUNTY OF NEW YORK, *ss:*

Frederic H. Mollenhauer being duly sworn deposes and says:

One. That he resides and for more than seven years has continuously resided in the City of New York, and had an office therein.

Two. That until the revocation of his consent as hereinafter mentioned he was designated under the Statute, by The Interior Construction & Improvement Company, a stock corporation organized and existing under and by virtue of the laws of the State of New Jersey, as the person upon whom process against the said corporation, might be served within the State of New York.

Third. That on the 10th day of November, 1904, he made and executed and on the 14th day of November, 1904, caused to be filed in the office of the Secretary of State, pursuant to statute, a
110 revocation of his consent to said designation, copy of which revocation is hereto annexed marked Exhibit "A".

Deponent further says that he has seen a letter, copy of which is hereto annexed marked Exhibit "B," signed by the Secretary of State to the effect that the said revocation was duly filed in the office of the Secretary of State on said 14th day of November, 1904.

Fourth. That before the said 10th day of November, 1904, the said corporation The Interior Construction & Improvement Company, ceased to do business within the State of New York and removed therefrom and has not since such removal and cessation to do business maintained any office or place of business within this State but has maintained and maintains now such office and place of business in the City of Detroit, State of Michigan, and has ever since done business in said City and State.

FREDERIC H. MOLLENHAUER.

Sworn to before me this 29th day of November, 1904.

FREDERICK H. RIDGWAY,
*Notary Public* (40) *County of New York.*

111 EXHIBIT A.

Pursuant to the provisions of Section 16 of General Corporation Law of the State of New York, and section 432 of the Code of Civil Procedure of said State, I, Frederic H. Mollenhauer, of the city of New York, in the State of New York, heretofore designated by The Interior Construction & Improvement Company, a stock corporation organized and existing under and by virtue of the laws of the State of New Jersey, as the person upon whom process against the said corporation may be served within the State of New York, do hereby certify as follows:

That my consent to such designation by said corporation was annexed to the designation made by said corporation, and duly filed in the office of the Secretary of State of the State of New York.

That said corporation, The Interior Construction & Improvement Company, has ceased to do business within this State.

That I hereby revoke my said consent to the designation so made by said corporation, as the person upon whom process against the said corporation may be served within the State of New York.

FREDERIC H. MOLLENHAUER.

STATE OF NEW YORK, *County of New York, ss:*

On this 10th day of November, 1904, before me personally appeared Frederic H. Mollenhauer, to me known, and known to me to be the same person described in and who signed the foregoing
112 instrument, and he duly acknowledged to me that he signed and executed the same for the uses and purposes therein mentioned.

C. C. LEEDS, [SEAL.]
*Notary Public, N. Y. Co.*

EXHIBIT B.

State of New York, Office of the Secretary of State.

ALBANY, *Nov.* 14, 1904.

Interior Construction & Improvement Company, 45 Wall Street, N. Y. City.

GENTLEMEN: Mr. Frederic H. Mollenhauer, the person designated by your Company as a person upon whom process against the said corporation may be served, has this day filed his revocation in this office.

Respectfully yours, JOHN F. O'BRIEN,
*Secretary of State.*

113 *Affidavit of C. Walter Artz Read on Behalf of I. C. & I. Co.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

CITY, STATE, AND COUNTY OF NEW YORK, *ss:*

C. Walter Artz being duly sworn deposes and says:

That he resides in the City of New York, having an office at No. 52 Broadway in said City; that he is counsel for the defendant The Interior Construction & Improvement Company herein, for the purpose only of moving to set aside the service of the summons signed by Bushnell & Metcalf, attorneys for plaintiff, of Buffalo, New York, served together with Complaint upon the Secretary of State, for the defendant The Interior Construction & Improvement Company herein on the 16th day of November, 1904, at the suit of Lathrop, Shea & Henwood Company plaintiff against The Pittsburg, Shawmut & Northern Railroad Company and The Interior Construction &

114 Improvement Company, defendants, on the ground that said service was improper and invalid for the reasons among others that said defendant The Interior Construction & Improvement Company had ceased to do business and removed its office from this State before the attempted service of said summons; that after said corporation had removed its office from this State and ceased to do business therein and before said attempted service the said Frederic H. Mollenhauer, the person heretofore designated as a person upon whom summons and other process might be served within this State, had duly made, executed and filed his revocation of consent, and that no other designation was thereafter made; that the conditions under which service may be made upon the Secretary of State provided for by Section XVI of the General Corporation Law as amended by Chapter 490 of the Laws of 1904, to wit: The death or removal of the person designated from the place where the corporation has its principal place of business within the State, do not exist in this case and there is no ground upon which service may be made upon the Secretary of State as upon said defendant The Interior Construction & Improvement Company.

Deponent annexes hereto a copy of the summons handed to Hon. John F. O'Brien, Secretary of State, which deponent is advised was attempted to be served upon said Secretary of State for said corporation, on the 16th day of November, 1904.

Deponent further says that no appearance or answer has been served in this cause on behalf of said The Interior Construction & Improvement Company; that by reason of the deponents absence from the City the matter was not brought to his attention until November 28th, 1904; that the said The Interior Construction & Im-

provement Company desires an order to show cause for the
115 purpose of moving to set aside said service returnable in less than eight days, in order that there may be ample time for decision thereupon before the 6th day of December, 1904, which, if said attempted service shall be held good, is the last day for said defendant to appear and answer herein.

This action is not issue. The term appointed for holding the next trial term where this action is triable opens January 2nd, 1905.

That no previous application for an order to show cause why said attempted service should not be set aside has been made herein.

C. WALTER ARTZ.

Sworn to before me this 29th day of November, 1904.

PHILIP J. ROSS,
*Notary Public, N. Y. Co.*

116 *Summons.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

To the Above Named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys, within twenty days after the service of this Summons, exclusive — the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default; for the relief demanded in the complaint.

Trial to be held in the County of Erie;

Dated this 6th day of September, 1904.

BUSHNELL & METCALF,
*Attorneys for Plaintiff.*

Office & P. O. Address No. 688-94 Ellicott Sq., Buffalo, N. Y.

117 *First Affidavit of Robert B. Killgore Read on Behalf of Plaintiff.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Robert B. Killgore, of the City, County and State of New York being duly sworn deposes and says:—

On behalf of Messrs. Bushnell and Metcalf, 688-94 Ellicott Square, Buffalo, N. Y., attorneys for plaintiff in the above entitled action, I have been, since September 8th, 1904, endeavoring to serve the summons and complaint on the above named defendant, Interior Construction & Improvement Company, a New Jersey corporation having an office at No. 45 Wall Street in the City, County and State of New York. As I was unable to find any person at the company's office who would acknowledge any connection with it, I wrote to the Secretary of New York on the 27th day of October, 1904 requesting him to furnish me the name of the agent of the company on whom service could be made as shown by the certificate filed
118 in his office under the requirements of the statute. In reply I received the letter hereto annexed and marked Exhibit A in which the name of Frederick H. Mollenhauer is given as such agent. Thereafter I again called at 45 Wall St., New York City, and found the name of F. H. Mollenhauer as well as that of the company on the bulletin board in the public hall of the building and a statement that they both were to be found on the 6th floor in Rooms 65-67. On inquiry at 65-67 I was informed again that no person connected with said defendant was about and on specific inquiry for Frederick H. Mollenhauer was told that he was not connected with the Interior Construction & Improvement Company; that he had not been at the offices since last Spring; that they did not know where he was; and that they were holding mail for him because they did not know where to forward it. On further inquiry a young man in the outer office advised me to try the "Cuban Steamship Company" 32 Broadway if I wanted Mollenhauer. I immediately went there and on inquiry at the office of the "Cuban Land & Steamship Company" was told that Mollenhauer called there at regular intervals but that his whereabouts were unknown.

On consulting a New York directory for the year 1904 Frederic H. Mollenhauer's name could not be found but in the edition for 1903 his address was given as 1133 Broadway. On calling there I learned that he had been located in the building but that he had moved away and that his present address was unknown.

On November 11, 1904, I received from Messrs. Bushnell & Met-

calf the letter from the Secretary of State annexed thereto and marked Exhibit B, which confirms Exhibit A previously received by me to the effect that Mollenhauer was the agent for the In-
119 terior Cons. & Improvement Co. on whom service was to be made and confirming the address 45 Wall Street, New York City, at which I had originally endeavored to find him.

I made diligent search for Mollenhauer and have been unable to find him at the address given in Exhibit B or in any other place to which I have been referred. From such facts as I have been able to gather I believe that he has removed from 45 Wall Street and that there is no person at the company's office on whom service can be made. I have also made every effort to find some officer of the company within the state but have been unsuccessful and believe the defendant to be avoiding service.

ROBERT B. KILLGORE.

Sworn to before me this 11th day of Nov., 1904.

ROBERT B. KNOWLES,
*Notary Public, No. 61, New York City.*

EXHIBIT A.

State of New York, Office of the Secretary of State.

ALBANY, *October* 28, 1904.

Robert B. Killgore.

DEAR SIR: A statement by the Interior Construction & Improvement Company, a corporation, incorporated under the laws of the State of New Jersey under Section 16 of the General Corporation Law, including a designation of Frederic H. Mollenhauer as
120 person in the State of New York upon whom process may be served, accompanied by his consent, was filed in this office on the first day of April, 1899, and the certificate of authority under Section 15 of said laws was issued on the same day.

Yours respectfully, JOHN F. O'BRIEN,
*Secretary of State.*

EXHIBIT B.

State of New York, Office of the Secretary of State.

ALBANY, *November* 9, 1904.

Bushnell & Metcalf.

DEAR SIRS: A statement by the Interior Construction & Improvement Company, a corporation, incorporated under the laws of the State of New Jersey under Section 16 of the General Corporation Law, including a designation of Frederick H. Mollenhauer, 45 Wall Street, New York City, as a person in the State of New York upon whom process may be served, accompanied with his consent, was

filed in this office on the first day of April, 1899, and the certificate of authority under section 15 of said law was issued on the same day.

Yours respectfully, JOHN F. O'BRIEN,
*Secretary of State.*

121 *Affidavit of Clarence M. Bushnell Read on Behalf of Plaintiff.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

Clarence M. Bushnell being duly sworn deposes and says that he is one of the attorneys for the plaintiff in the above entitled action; that this action is brought to recover upon a contract made between the plaintiff and the defendant The Interior Construction & Improvement Company for the construction of the Pittsburg, Shawmut & Northern Railroad Company's road in the county of Allegany during the years 1902-3; that the differences arising between the parties to this action growing out of said contracts as alleged in the said complaint, are all within the personal knowledge of deponent and deponent as attorney for the plaintiff, had full charge
122 and management of the negotiations between the parties in attempting the adjustment of their differences. That as late as the 28th day of July, 1904, deponent had an interview with H. S. Hastings, the General Agent of the Interior Construction & Improvement Company and the Auditor and Comptroller of the said Railway Company, at deponent's office in the City of Buffalo, N. Y., and that for several weeks prior thereto, deponent was in correspondence with said Hastings and Frank Sullivan Smith, Esq., the Vice-President and General Counsel of the defendant, The Pittsburg, Shawmut & Northern Railroad Company, as to the settlement and adjustment of the claims of the plaintiff against the defendants herein.

That on the 18th day of November, 1904, deponent had a conversation with W. W. Waring, an Attorney & Counselor-at-Law, residing at Olean, N. Y., as to a certain action that he had for certain other contractors who constructed a portion of the Pittsburg, Shawmut & Northern Railroad under a contract from the defendant, The Interior Construction & Improvement Company; that deponent then asked Waring how he obtained service upon said Interior Construction & Improvement Company and Waring replied that the Interior Construction & Improvement Company had brought an action against his clients who were the contractors under said Construction Company, and which action is now pending and undetermined.

That deponent verily believes from the information he has derived of the affairs of the said Interior Construction & Improvement Company that said Company is still doing business within the State of New York and has an office at No. 54 Wall Street, as
123 appears by the affidavit of Robert B. Killgore, verified November 11th, 1904.

C. M. BUSHNELL.

Sworn to before me this 2nd day of Dec., 1904.
CHARLES G. SIGNOR,
*Notary Public for Orleans Co.*

Certificate filed in Erie Co.

*Second Affidavit of Robert B. Killgore Read on Behalf of Plaintiff.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Robert B. Killgore, of the City, County and State of New York, being duly sworn, deposes and says:

I am the person of that name who previously made an
124 affidavit setting forth my various attempts to serve the above named defendant the Interior Construction & Improvement Company. On the 2nd day of December, 1904, I again examined the directory or bulletin board in the main hall on the ground floor of the premises known as 45 Wall Street in the City, County and State of New York, and, among others, the following names appeared therein under letter "I".

| | Floor. | Room. |
|---|---|---|
| Interior Construction & Improvement Co..... | 6 | 65-67 |

And under the letter "M".

| | | |
|---|---|---|
| Mollenhauer, F. H..... | 6 | 65-67 |

The following entry appears on page 555 of the Telephone Directory of the New York Telephone Company, dated September 1, 1904:

"Broad.....1566.....Interior Construction & Improvement Company, 45 Wall."

ROBERT B. KILLGORE.

Sworn to before me this 2d day of December, 1904.
ROBERT B. KNOWLES,
*Notary Public, No. 61, New York Co.*

125 *Affidavit of Frank H. Wimmell Read on Behalf of Plaintiff.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of Erie, ss:*

Frank H. Wimmell, of the borough of Queens, City of New York, New York, being duly sworn, deposes and says: I am a clerk in the employ of Murphey & Metcalf, lawyers, having offices in number 15 Wall Street in the City, County and State of New York. On the second day of December, 1904, at the request of Robert B. Killgore, I examined the bulletin containing the names of the tenants of the building at 45 Wall Street in the City, County and State of New York, which is fixed to the wall of the hall on the main floor of the building. I found thereon the names of the Interior Construction & Imp't Co. and of F. H. Mollenhauer, and both were located on the sixth floor at rooms sixty-five and sixty-seven.

FRANK H. WIMMELL.

Sworn to before me this 2nd day of December, 1904.
ROBERT B. KNOWLES,
*Notary Public, No. 61, New York Co.*

126 *Affidavit of Frederic H. Ridgway in Reply.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Frederic H. Ridgway being duly sworn deposes and says:

That he resides in the City of New York and is the Private Secretary of John Bryne, the chairman of the Board of Directors of The Pittsburg, Shawmut & Northern Railroad Company; that said John Byrne as such chairman, has a suite of offices at No. 45 Wall Street, New York City; that up to the time when The Interior Construction & Improvement Company ceased to do business in the State of New York, which was before the 10th day of November, 1904, to wit, the 3d day of August, 1904, said Interior Construction & Improvement

Company had an office in the suite occupied by said John Byrne; that there is in the Public Hall in said building a public directory or bulletin, upon which the names of the tenants are painted in
127 large letters; that there is also in the public hall of said building a small pasteboard card with printed names thereon, showing the tenants in the building, which names are arranged alphabetically; that said paste-board card is within a frame behind a glass case inacces-ible to anyone except those having charge thereof; that the tenants in the building have a right, at their own expense, to have printed upon the large bulletin board in the hall, such names and make such erasures thereon as they desire; that they also have the right to have printed, at their own expense, upon their own doors such names or to make such erasures thereon, as they desire; that the tenants have no access whatever to the printed pasteboard card mentioned above, and that changes thereon are made only by those having charge of the same; that the name of The Interior Construction & Improvement Company has not been upon the large printed directory or bulletin in the public hall of said building for a long time, namely, for a period of two years or thereabouts; that the name of the Interior Construction & Improvement Company was not upon the door of the suite of offices occupied by the said John Byrne at the time of service of the summons herein nor previous thereto since the 3d day of August, 1904, when the Interior Construction & Improvement Company ceased to do business within this State, that the name of The Interior Construction & Improvement Company did appear on said pasteboard card mentioned as aforesaid, at the time of the service of this summons and so appears at the present time; that deponent as private secretary of said John Byrne, many times previous to the summons herein, after said Interior Construction & Improvement Company had ceased to do business within this State, made an application and gave a positive direction to the parties having charge of said pasteboard bulletin, to have the name of The Interior Construction & Improvement Company
128 removed therefrom; that they wholly failed and neglected to remove the same therefrom although requested by deponent and directed arbitrarily to do so; that there not only remains the name of the Interior Construction & Improvement Company upon said pasteboard bulletin but there also remains the names of a large number of other tenants which have been gone from said building, to deponents own knowledge, for long periods of time running back in one instance for a period of three years; that the parties in charge of said pasteboard bulletin apparently make no effort to keep the same correct or authoritative and not only neglect the same but when requested to make changes thereon wholly fail to do so; that as Private Secretary of said John Byrne deponent knows that the said Interior Construction & Improvement Company removed its office from No. 45 Wall street, upon the 3rd day of August, 1904, and is informed and believes from correspondence in his possession, that its present place of business and office *it* at Detroit, Michigan, and that it removed its office to Detroit, Michigan on the date of its removal

from 45 Wall street, and that since said date it has had no other place of business within this State.

FREDERIC H. RIDGWAY.

Sworn to before me this 2rd day of December, 1904.

FREDRIC W. FROST,
*Notary Public, No. 41, Kings County.*

Certificate filed in New York County.

129 *Affidavit of Frank P. Byrne Read on Behalf I. C. & I. Co. in Reply.*

Supreme Court. Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY, and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

STATE OF MICHIGAN, *County of Wayne, ss:*

Frank P. Byrne, being duly sworn, deposes and says that he is a resident of the City of Detroit, and State of Michigan. That deponent was for a number of years and until the 4th day of August, 1904, a member of the Board of Directors and President of the Interior Construction & Improvement Company, a New Jersey Corporation. That upon said 4th day of August, A. D., 1904, deponent tendered his resignation as President of said company and as member of the Board of Directors thereof at a meeting of the Board of Directors of said Company and at which he was present, in the City of Detroit. That said resignation was accepted at said meeting. Deponent further says he is familiar with the business and affairs of said company and that said corporation has not
130 done any business in the State of New York since said 4th day of August, 1904.

FRANK P. BYRNE.

Subscribed and sworn to before me this third day of December, A. D., 1904.

[SEAL.]

HORACE H. RACKHAM,
*Notary Public, Wayne County, Michigan.*

My commission expires Nov. 6, 1905.

*Affidavit of Alexander Munro Read on Behalf of I. C. & I. Co. in Reply.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF MICHIGAN, *County of Wayne, ss:*

Alexander Munro, being duly sworn, deposes and says that he is Assistant Secretary of the Interior Construction and Improvement Company, a New Jersey corporation, and that he attended a meeting of the Board of Directors of said corporation, held at the
131 City of Detroit, on the 4th day of August, A. D., 1904, at which meeting a motion was offered and adopted, authorizing and directing the removal of the office of said company from the City of New York to the City of Detroit. That the said motion, as the same appears upon the records of said company, is in words and figures as follows, to wit:

"Director Munro moved that the branch office of the company heretofore located at number 45 Wall Street, in the city of New York, be moved from said place to number 33 Peninsular Savings Bank building, in the city of Detroit, Michigan, which motion being duly supported by Director Armstrong, was put to vote by the chair, and unanimously carried."

And further deponent says not.

ALEXANDER MUNRO.

Subscribed and sworn to before me this third day of December, A. D., 1904.

[SEAL.]

HORACE H. RACKHAM,
*Notary Public, Wayne County, Michigan.*

My commission expires Nov. 6, 1905.

132 *Certificate of Alexander Munro to Resolution of Board of Directors Read on Behalf of I. C. & I. Co., in Reply.*

"Director Munro moved that the branch office of the Company heretofore located at number 45 Wall Street, in the City of New York, be moved from said place to number 35 Peninsular Savings Bank Building, in the City of Detroit, Michigan, which motion being duly supported by Director Armstrong, was put to vote by the Chair and unanimously carried."

I, Alexander Munro, Assistant Secretary of the Interior Construction and Improvement Company, do hereby certify, that the above

and foregoing is a true copy of the record of the motion authorizing the removal of the office of said company to the City of Detroit, as the same was offered and adopted at a meeting of the Directors of said company held in the City of Detroit on the 4th day of August, A. D., 1904.

Witness my hand this third day of December, 1904.

ALEXANDER MUNRO,
*Asst. Sec'y Interior Construction and Improvement Company.*

133 *Affidavit of Henry S. Hastings Read on Behalf of I. C. & I. Co. in Reply.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY, and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

STATE OF PENNSYLVANIA, *County of Elk, ss:*

Henry S. Hastings, being duly sworn says, that he is above the age of twenty-one (21) years, and is employed at St. Marys, Pennsylvania, that he is the general agent of the Interior Construction and Improvement Company, one of the above named defendants; that the Interior Construction and Improvement Company was organized pursuant to the laws of the State of New Jersey about the year 1899, for the purpose of doing a general contracting and construction business; that the said company soon after its incorporation did the necessary work for bringing natural gas to the City of Detroit from the gas fields of the State of Ohio; that subsequently, and about the year 1891, the said Construction Company entered into contracts for, and did a large amount of the construction work necessary to, the building of the Allegheny & Kinzua Railroad in McKean County Pennsylvania; that subsequently the said
134 Construction Company entered into a contract for the construction of the railroad of the Pittsburg, Shawmut & Northern Railroad Company in the States of New York and Pennsylvania; that the said Construction Company on or about the first day of June, 1902, entered into sub-contracts for the construction of portions of the said railroad with the above named plaintiff; that during the years 1902, 1903, and the early part of 1904, work of said construction of said railroad was carried on by the said Construction Company; that during the Summer of 1904, the work of construction of said railroad was practically completed; that on the first day of July, 1904, the said Construction Company surrendered to the said railroad company all the work upon which it had been engaged; that on the third day of August, 1904, the said Construction Co., ceased absolutely to do or carry on any business within the State

of New York; that on or prior to said date, it sold all its plant, machinery and other equipment located within the State of New York, used in the construction of the said railroad; that the said Interior Construction and Improvement Company has not at any time since the said third day of August, 1904, transacted or engaged in any business, either with the Pittsburgh, Shawmut & Northern Railroad Company, or with any other person, firm or corporation, within the State of New York—except that the said Construction Company has paid a few bills within the State of New York, the indebtedness on which was incurred prior to the said third day of August, 1904, that the said construction company is not now the owner of, and has not had in its possession, since the said third day of August, 1904, any property within the State of New York.

Deponent further states that the Interior Construction and Improvement Company has an office at Passaic, New Jersey,
135 that it also has a general office at Detroit, Michigan, that the President of said construction company is John C. Donnelly, who resides at Detroit, Michigan; that it has no Vice President; that the Treasurer and Secretary *are* Daniel Armstrong, who resides at Detroit, Michigan; that deponent is the General Agent; that the said Construction Company has no office or officers within the State of New York.

HENRY S. HASTINGS.

Sworn to before me this 5th day of December, 1904.

[SEAL.] G. F. KINSELLA,
*Notary Public.*

Commission expires Jan'y 19, 1907.

136 *Order Denying Motion.*

At a Special Term of the Supreme Court, held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 7th day of December, 1904.

Present: Hon. Watson M. Rogers, Justice Presiding.

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY and THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, Defendants.

A motion having been duly made by the defendant, The Interior Construction and Improvement Company, appearing specially herein for an order setting aside the service of the summons herein on the Secretary of State of the State of New York, and after hearing C. Walter Artz, who appeared especially as counsel for the defendant, The Interior Construction & Improvement Company, for the purposes of this motion only, in favor of said motion,

and J. H. Metcalf, of counsel for the plaintiff in opposition thereto, and after reading the affidavits of Frederick H. Mollenhauer, verified on the 29th day of November, 1904, and the affidavit of C. Walter Artz, verified on the 29th day of November, 1904, and the affidavits of Henry S. Hastings, verified December 5; and of Frank P. Byrne, Alexander Monroe and Fred-
137 erick H. Ridgeway, verified the 2d day of December, 1904, in favor of said motion, and the affidavit of C. M. Bushnell, verified on the 2nd day of December, 1904, and the affidavits of Robert B. Killgore, verified on the 11th day of November, 1904, and the 2d day of December, 1904, respectively, and the affidavit of Frank H. Wimmel, verified on the 2d day of December, 1904, in opposition to said motion, and all of said papers are filed herewith.

Now on motion of Bushnell & Metcalf, attorneys for the plaintiff,

It is ordered, that the motion of the said defendant, The Interior Construction & Improvement Company to set aside the service of the summons herein on the Secretary of State of the State of New York, be and the same is hereby denied with $10.00 costs of this motion to the plaintiff and against the said defendant, The Interior Construction & Improvement Company.

It is further ordered, that if the said defendant, The Interior Construction & Improvement Company perfects an appeal to the Appellate Division of this Court within ten days from the entry and service of this order and if said appeal is brought on for argument without delay on the part of the said defendant, The Interior Construction & Improvement Company, that then all proceedings on the part of the plaintiff as against the said defendant, The Interior Construction & Improvement Company be stayed until the hearing and decision of said appeal, and if the said order so appealed from is affirmed that said defendant, The Interior Construction & Improvement Company have ten days from the service of the order of affirmance to answer or plead to the plaintiff's complaint herein.

Granted.

Dec. 7, 1904.

PERRY E. WURST,
*Sp. Dep. Clerk.*

138 *Affidavit of No Opinion.*

Supreme Court, Erie County.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY, and THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendants.

STATE OF NEW YORK, *County of Erie, ss:*

Harry B. Lamson, being duly sworn, deposes and says: I am an attorney and counselor at law and the managing clerk for Bissell,

Carey & Cooke, attorneys at law, of counsel for the defendant, The Interior Construction and Improvement Company, in the action above entitled, and I am informed and verily believe that no opinion was written by the court upon the decision of the motion herein.

HARRY B. LAMSON.

Sworn to before me, this 13th day of Dec., 1904.

JOHN W. VAN ALLEN,
*Notary Public in and for Jefferson Co., N. Y.*

Certificate filed in Erie Co., N. Y.

139 *Notice of Appeal.*

Supreme Court, Appellate Division, Fourth Department.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff-Respondent,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant-Appellant, Impleaded with PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY, Defendant.

Please take notice that The Interior Construction and Improvement Company above named, appeals to the Appellate Division of this Court, in and for the Fourth Judicial Department, from the order of the Special Term, denying the motion of the said The Interior Construction and Improvement Company to set aside service of Summons herein upon the Secretary of State, which said order was entered herein in the office of the Clerk of the County of Erie on the 7th day of December, 1904, and from each and every part of said order.

Dated December 14, 1904.

Yours, etc., C. WALTER ARTZ.
*Attorney Specially Appearing for The Interior Construction and Improvement Company, Defendant-appellant, for Purposes of Motion Only.*

52 Broadway, Borough of Manhattan, New York City.

140 To Mess. Bushnell & Metcalf, Attorneys for plaintiff-respondent, and to John H. Price, Esq., Clerk of the County of Erie.

141 *Stipulation.*

Supreme Court, Appellate Division, Fourth Department.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff-Respondent,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant-Appellant, Impleaded with PITTSBURG, SHAWMUT & NORTHERN RAILWAY COMPANY, Defendant.

It is hereby stipulated that the foregoing papers are true copies of the original papers on appeal from order denying motion to set aside service of summons upon the Secretary of State herein; and certification of such papers under Section 1353 of the Code of Civil Procedure and the rules of this Court is hereby expressly waived; and it is hereby consented that the appeal may be argued upon the uncertified printed papers of which the foregoing is a copy.

Dated, December 16, 1904.

C. WALTER ARTZ,
*Attorney Specially Appearing for the Interior Construction and Improvement Company, Defendant-appellant, for Purposes of Motion Only.*

BUSHNELL & METCALF,
*Attorneys for Plaintiff-respondent.*

142 United States Circuit Court for the Western District of New York.

LATHROP-SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

Bushnell & Metcalf, J. H. Metcalf, for plaintiff.
Daniel J. Kenefick, C. Walter Artz, for defendant.

HAZEL, *J.*:

This application by the defendant, The Interior Construction and Improvement Company, a foreign corporation, (herein called the construction company), is to vacate a judgment rendered on default in pleading and to set aside the summons and service thereof as null and void. The action was originally brought in the Supreme Court of the state of New York against the Pittsburg, Shawmut & Northern Railroad Company, a domestic corporation, (herein called the railroad company), and the construction company, jointly, to recover money for services performed and materials furnished in the year 1902, pursuant to contract with the construction company, it being alleged in the complaint that the construction company acted as agent of the railroad company. Pursuant to #16 of the general

corporation law of the state of New York and as a condition of doing business therein, the construction company designated one Mollenhauer, a resident of the City of New York, as a person upon
143 whom process against it might be served within the state. Afterwards, on November 14, 1904, Mollenhauer in accordance with the provisions of subdivision 2 of #432 of the code of civil procedure, filed an instrument in writing in the office of the Secretary of State consenting to the revocation of his designation. On November 16, 1904, the summons in this action was served upon the Secretary of State under said #16 of the general corporation law, which substantially provides for substituted service upon that officer of process against foreign corporations doing business in this state in the event either of the death of the person designated or his removal from the place where the corporation has its principal office within the state and the corporation has omitted to designate another person. Before the expiration of the time to answer or demur and on December 6, 1904, the construction company, appearing specially for that purpose, made a motion to set aside the service of the summons as aforesaid, upon the ground that at the time thereof it was not doing business in this state and that the designation of Mollenhauer had in fact been revoked. In support of such motion affidavits were read showing that in the month of August, 1904, the construction company discontinued its business operations in this state and removed its office to the city of Detroit, Michigan. By the opposing affidavits it was shown that the construction company prior to the removal of its office and business brought an action in the Supreme Court of the State of New York against a firm of subcontractors for the construction of the railroad which action was pending at the time of the purported service of the summons. In other respects the assertion of the construction company as to the removal of its office and the discontinuance of its business was not
144 controverted. The motion to annul the service of the summons was denied by the Supreme Court and its decision was subsequently affirmed by the Appellate Division without opinion. Later leave to appeal to the Court of Appeals was denied. In the meanwhile the time of the construction company had been extended by stipulation and order until ten days after denial of the application to appeal and entry of the order thereon.

On February 6th, 1905, a petition for removal to this court was presented to the state court in conformity with the provisions of the revised statutes of the United States and the removal being effected a motion was made in this court to set aside the service of the summons. Thereupon the plaintiff moved to remand the case to the state court, and, on March 17, 1905, the plaintiff's motion was granted on the ground that no separable controversy existed the motion of the construction company to dismiss the substituted service being at the same time overruled. Lathrop-Shea & Henwood Co., *vs.* Pittsburg Shawmut & Northern R. Co. 135 Fed. Rep., 619. Before the time to plead expired a motion was made by the construction company in the state court for further time to answer, it having meanwhile moved to compel the plaintiff to elect the defendant

against which the action should be prosecuted. The latter motion being denied, the construction company later defaulted in pleading. The issues raised by the railroad company were sent by the state court to a referee to hear, try and determine and on October 26, 1905, the action against the railroad company was dismissed on the report of the referee. Prior thereto, on September 27, 1905, because of the default of the construction company, judgment was rendered
145 against it for the sum of $47,363.15. Following the entry of judgment a motion was made and granted by the state court dismissing the complaint against the railroad company in accordance with the decision of the referee, and thereafter the construction company on October 31, 1905, again removed the action into the federal court and attacked the service of the process for invalidity. The plaintiff once more moved to remand on the ground that an appeal had been taken from the judgment rendered upon the decision of the referee and accordingly it was thought that there was not a division of the action into separate controversies. Plaintiff's motion was granted. Lathrop-Shea & Henwood Co., *vs.* Interior Cons. & Imp. Co., 143 Fed. Rep., 687. Subsequently on December 4, 1906, the Appellate Division of the state court sustained the referee and such decision being regarded as a final determination of the non-liability of the railroad company and a division of the controversy, the case for the third time was removed to this court, and the defendant, construction company, again moves to set aside the purported service upon the Secretary of State. In opposition to the motion the plaintiff urges two grounds, that the proceedings in the state court are *res adjudicata* and that the substituted service upon the defendant, foreign corporation, is valid.

In support of the first ground plaintiff directs special attention to the cases of Mutual Reserve Assn. *vs.* Phelps, 190 U. S. 147; Bragdon *vs.* Perkins, Campbell Co., 82 Fed. Rep., 338 and Allmark *vs.* Platte S. S. Co., 76 Fed. Rep., 614. These adjudications, however, are not thought to be apposite. In the Phelps case the defendant
146 corporation concededly was doing business in the state of Kentucky, though its permission to do so had been withdrawn by the insurance commissioner, and under such circumstances the service of the summons upon the latter pursuant to the statute providing therefor, was held valid. In the Perkins-Campbell case a general appearance was interposed by the defendant and before the removal of the case a dispute arose as to whether the person served with process was the agent of the defendant company or merely a travelling salesman on commission. It was proven by the plaintiff that the person served was the general agent of the defendant and upon the merits the state court dismissed the application to annul the substituted service. In this situation the case was removed and motion made in the federal court to invalidate the service. No new or different facts were elicited than those already passed upon by the state court. It was accordingly held that as lack of jurisdiction was not disclosed by the facts, the circuit court was concluded by the decision of the state court. In the Allmark case it was broadly held that after the denial by the state court of the motion to set aside

service of the summons there can be no renewal of the motion in the federal court without obtaining leave to do so and the case was taken by that court in the condition in which it left the state court. An examination of the record in the case mentioned persuasively indicates that the question decided by the state court was simply whether the service in fact was made upon the managing agent. Upon conflicting affidavits the state court decided that the defendant was doing business in the state and the person served was its agent.

147 The case at bar does not fall within the principle enunciated in the cases mentioned. Beyond doubt it is a general rule that the federal courts in a case removed from the state court will not sit in review of any act done by that court prior to the removal, and comity dictates that what was done by a court of coordinate jurisdiction before the case was removed is entitled to great respect and the decrees of such court are ordinarily regarded as correct adjudications of the questions involved. Where, however, the state court acted without jurisdiction a different rule unquestionably applies. (Loomis *vs.* Carrington, 18 Fed. Rep. 97,) and the inaptitude of the doctrine of *res adjudicata* is plainly apparent in a case such as this where the defendant, a citizen of another state having withdrawn its business and property from this state, has the absolute right to remove an action brought against it to the federal court. Such a right unless waived by general appearance or otherwise forfeited is founded upon the defendant's alienage or citizenship of another state and was granted by an act of congress. Under such circumstances no state is permitted by its action to abridge or nullify a right granted pursuant to constitutional law. Tortat *vs.* Harden Min. & Mfg. Co., 111 Fed. Rep., 426.

The primal question for determination upon the papers presented are whether the construction company at the time this action was brought had ceased to transact business in the state of New York and whether the purported service was valid. These submitted questions invoke the jurisdiction of this court. In deciding them this court is bound by abundant authority to exercise the power of determining whether jurisdiction in fact has attached without

148 being influenced or persuaded by the decisions of the state tribunals. The trend of the adjudications which this court is constrained to follow indicate that the federal courts are the sole judges of their own jurisdiction, which manifestly is derived from a government differing from that which clothes the state tribunals with judicial power. Pennoyer *v.* Neff, 95 U. S. 714. The special appearance of the construction company in the Supreme Court of the State of New York for the single purpose of insisting that no valid service had been made upon it, that it had actually stopped doing business in this state, had removed its property therefrom and revoked the designation of its agent under the statutes prior to such service, was not a waiver of its right or a submission to the claimed jurisdiction. This principle is clearly adduced from the following cases cited in defendant's brief: Renington *vs.* Central Pacific Railroad Co. 198 U. S. 92; Powers *vs.* C. & O. Railway, 169 U. S. 92; Johnson *vs.* Computing Scale Co. 139 Fed. Rep., 339;

Morris *vs.* Graham, 51 Fed. Rep., 52; Porter L. & W. Co. *vs.* Baskin, 43 Fed. Rep., 323; Harkness *vs.* Hyde, 98 U. S. 476; Goldey *vs.* Morning News, 156 U. S. 818; Barrow Steamship Co. *vs.* Kane, 170 U. S. 100; Bentlif *vs.* London etc. 44 Fed. Rep., 667; Conley *vs.* Mathieson Alkali Works, 190 U. S. 406; Courtney *vs.* Pradt, 196 U. S. 89; Cady *vs.* Associated Colonies, 119 Fed. Rep., 420; So. Pac. Co. *vs.* Denton, 146 U. S. 202.

The crucial point is whether the service upon the Secretary of State was sufficient to bring the defendant within the jurisdiction of the state court. The plaintiff urges that before this action was brought and while the construction company was concededly
149 engaged in business in this state it brought an action which is still pending in the Supreme Court of this State against one Maclean. The cause of action arose out of the construction by the defendant of the railroad mentioned in the complaint, but whether the subcontract for such work involved in said action was made or performed in the State of New York does not appear. The contention that a foreign corporation (which has complied with #16 of the corporation law of New York) cannot maintain or prosecute an action in the state court and also be heard to claim in an action brought in that court against it, that such court is without jurisdiction on the ground that the business and property of the corporation has been removed from the state is not persuasive. And the suggestion that the certificate under which the business in this state is carried on by a foreign corporation by implication authorizes a constructive service upon the secretary of state, even though the business of the corporation has been discontinued in the state and the designation revoked, is without force. It is conceded by the plaintiff that the maintenance of the action in the state court by the defendant is not of itself doing business within the state. The Court of Appeals in the case of Penna. Collieries Co. *vs.* McKeever, 183 N. Y. p. 103, recently held that the term

"'doing business in the state' implies corporate continuity of conduct in that respect: such as might be evidenced by the investment of capital here with the maintenance of an office for the transaction of its business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on a business."

In Cady *vs.* Associated Colonies, *supra*, it is said:

"The fact that there was some claim against the defendant regaining from its former business in the state is not sufficient.
150 It must be engaged in transacting some substantial part of its ordinary business."

See also United States *vs.* American Bell Telephone Co. 29 Fed. Rep. 37; Buffalo Glass Co. *vs.* Manufacturers' Glass Co. 142 Fed. Rep. 273.

The maintenance of an action in the state court to enforce a liability or to settle outstanding accounts even though contracted while the corporation was engaged in doing business within this state but prior to the controversy in question is not thought a contin-

uation of the ordinary and substantial part of its business. Hunter *vs.* Mutual Reserve Life Ins. Co. 184 N. Y. 130.

This court cannot read into the state statute a provision which clearly is not contained therein. It was unquestionably within the power of the legislature to impose restrictive conditions as a prerequisite to a defendant's right to transact business in this state, for instance, it could have provided that service of process upon the Secretary of State should be constructive service upon a defendant during the existence of any outstanding liabilities in the state, the corporation having withdrawn its business therefrom, but such is not the provision of the statute and hence it would seem that the argument of counsel for plaintiff upon that point is simply resolved into a demand for a *quid pro quo* which manifestly cannot be entertained. For the reasons stated I am constrained to hold that after the defendant withdrew its business from this state and held no property therein, the designation being revoked, the subsequent purported service upon the Secretary of State was not service upon the defendant.

151 The motion of the construction company to vacate the default judgment and to set aside the service in question for lack of jurisdiction of the moving defendant must be granted.

Endorsed: United States Circuit Court, Western District of New York.—Lathrop-Shea & Henwood Co. Plaintiff, *vs.* The Interior Construction & Improvement Company, Defendant. Opinion.—Hazel, J. U. S. Circuit Court, Western dist. of N. Y. Filed Jan. 30, 1907. Harris S. Williams, Clerk.

152 At a Stated Term of the United States Circuit Court for the Western District of New York held in the Federal Building in the City of Buffalo on the 5th day of February, 1907.

Present: Hon. John R. Hazel, District Judge.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
Defendant.

This action having been duly removed into this Court from the Supreme Court of the State of New York, Erie County, on the petition of the above named defendant The Interior Construction & Improvement Company appearing in said Court specially for the purpose of such removal only, and a motion having been made herein by said defendant appearing in this Court specially, and for the purpose of such motion only, to set aside the summons in this action and the pretended service thereof on said defendant, to vacate the default judgment against said defendant entered upon said pretended service by said Supreme Court of the State of New York, in the office of the Clerk of the County of Erie, on the 27th day of September, 1905, and for further appropriate relief, and such motion having come on regularly to be heard at a Stated Term of this Court,

Now, upon reading and filing the order to show cause, granted herein on the 4th day of December, 1906, the affidavit of C. Walter Artz, verified December 4th, 1906, the affidavit of J. H. Metcalf, verified December 26th, 1906, the several affidavits and papers, referred to in said order to show cause, and theretofore filed in this Court, the certified record on removal filed herein, the said default judgment, and all the affidavits and papers filed and proceedings had herein in this Court and in the said Supreme Court of New York, and after hearing Daniel J. Kenefick, and C. Walter Artz, of counsel specially appearing for said defendant in support of said motion, and J. Henry Metcalf of counsel for plaintiff in opposition thereto, it is now on motion of C. Walter Artz, attorney for said defendant specially appearing as aforesaid,

153

Ordered that the aforesaid motion of said defendant The Interior Construction & Improvement Company arising upon the said order to show cause granted herein on said 4th day of December, 1906, be and the same hereby is granted; and that the summons in this action and the pretended service thereof on said defendant be, and the same hereby is, in all respects set aside, and the said default judgment vacated and declared to be void and of no effect; and that this action be dismissed for want of jurisdiction of said defendant.

JOHN R. HAZEL, *U. S. J.*

Endorsed: U. S. Circuit Court, Western District of New York.—Lathrop, Shea & Henwood Company, Plaintiff, against The Interior Construction & Improvement Company, Defendant.—Order granting motion to set aside summons, &c.—C. Walter Artz, Attorney for Deft. I. C. & I. Co. specially appearing for purposes of motion only, 52 Broadway, Manhattan, New York City.—U. S. Circuit Court, Western dist. of N. Y. Filed Feb. 5, 1907.—Harris S. Williams, Clerk.

154 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,

*vs.*

INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

To the Honorable Justices of the Supreme Court of the United States:

And now comes the plaintiff through its attorney J. H. Metcalf, and because it feels aggrieved at a decision and order rendered by this Court on the 5th day of February, 1907, in the above entitled cause, whereby the service of the summons on the above named defendant was set aside and the judgment entered thereon vacated and declared null and void and the complaint therein dismissed as to the above named defendant, and wherein it was directed that judgment be entered accordingly, and because the plaintiff feels that great error has been committed to its gr-at damage, it now prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United

Statues for the correction of the errors so complained of which errors are set forth in detail in an assignment of errors herein filed which is intended to be urged by this plaintiff, aand further that a transcript of the records and proceedings and papers upon which
155 the decision and order of this Court was rendeerd, duly authenticated, be sent to the Supreme Court of the United States, and also that such other and further proceedings may be had as are proper in the premises.

LATHROP, SHEA & HENWOOD COMPANY,
By J. H. METCALF, *Attorney.*

Dated Buffalo, N. Y., March 11th, 1907.

STATE OF NEW YORK,
*County of Erie, City of Buffalo, ss:*

J. H. Metcalf being duly sworn deposes and says that he is attorney for Lathrop Shea & Henwood Company the plaintiff in the above entitled action; that the foregoing petition is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the plaintiff, is that it is a corporation and none of its officers are now within the County of Erie, as deponent is informed and verily believes, and that deponent has personal knowledge as to all the matters alleged and set forth in said petition, and not stated upon information and belief, and has more knowledge of said facts than any of the officers of said plaintiff in error.

J. H. METCALF.

Sworn to before me this 15th day of March, 1907.

[SEAL.] JAMES T. DRISCOLL.
*Notary Public, Erie County, N. Y.*

156 Endorsed: United States Circuit Court, Western District of New York.—Lathrop, Shea & Henwood Company, Plaintiff, against Interior Construction & Improvement Company, Defendant.—Petition for Writ of Error.—J. H. Metcalf, Attorney for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y.—Read on application for Writ of error. John R. Hazel, U. S. J. U. S. Circuit Court, Western Dist. of N. Y. Filed Mar. 15, 1907. Harris S. Williams, Clerk.

157 Supreme Court of the United States.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff-in-error,
*vs.*
INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant-in-error.

Comes now the plaintiff in error above named, by J. H. Metcalf, its attorney and says, that in the records and proceedings in the above entitled matter, there is manifest error in each and every of the following decisions of the Court all of which was to the prejudice of the rights of the plaintiff in error and to his great damage, to-wit:

I. The Circuit Court Judge erred in deciding that the proceedings in the State Court are not *res adjudicata*.

II. The Circuit Court Judge erred in deciding that the service of summons upon the Secretary of State pursuant to Section 16 of the Corporations Laws of New York was not a service upon the defendant.

III. The Circuit Court Judge erred in deciding that the said service of summons was null and void as to the defendant and that therefore it was not within the jurisdiction of the State Court or of this Court.

IV. The Circuit Court Judge erred in deciding that the judgment rendered by default herein against the defendant is null and void.

158 V. The Circuit Court Judge erred in ordering the service of summons to be set aside and the judgment thereon be vacated and set aside.

Wherefore, the said Lathrop Shea & Henwood Company prays that the order of the said Circuit Court of the United States for the Western District of New York be reversed, and the said Circuit Court of the United States for the Western District of New York be ordered to enter an order affirming the judgment by default entered upon the service of the summons upon the Secretary of State as hereinbefore set forth.

J. H. METCALF,
*Attorney for Plaintiff-in-error.*

Nos. 688-94 Ellicott Sq., Buffalo, N

Endorsed: United States Circuit Court Western District of New York.—Lathrop, Shea & Henwood Company, Plaintiff, against Interior Construction & Improvement Company, Defendant.—Assignment of Errors.—J. W. Metcalf, attorney for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y.—U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 15, 1907. Harris S. Williams, Clerk.

159 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

On the 15th day of March, 1907, comes the above named plaintiff by its attorney, and files herein and presents to the Court its petition, praying for an allowance of a Writ of Error, and an assignment of error, intending to be urged by it; praying also that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

Now on consideration whereof, the Court does allow the Writ of Error and transcript of the records and proceedings and papers prayed for by the plaintiff, upon the plaintiff's giving a bond according to law in the penal sum of $500.00, that the appeal shall be prosecuted and the costs herein be paid if the judgment should go against it and that this bond shall be a supersedeas; and the Title, Guaranty and Surety Company is hereby accepted as Surety and its said bond is hereby approved.

Dated Buffalo, N. Y., March 15th, 1907.

JOHN R. HAZEL, *U. S. J.*

160 Endorsed: United States Circuit Court, Western District of New York.—Lathrop, Shea & Henwood Company, Plaintiff, *vs.* Interior Construction & Improvement Company, Defendant.—Order allowing Writ of Error.—J. H. Metcalf, Attorney for Plaintiff 688-694 Ellicott Square, Buffalo, N. Y.—U. S. Circuit Court Western dist. of N. Y. Filed Mar. 15, 1907. Harris S. Williams, Clerk.

161 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

Know all men by these presents, that the Undersigned, the Title, Guaranty and Surety Company, a corporation duly authorized to enter into bonds as surety, is held and firmly bound unto the above named Interior Construction & Improvement Company in the sum of five hundred dollars, to be paid to the said Interior Construction & Improvement Company, its successors and assigns, for the payment of which well and truly to be made, the Title Guaranty and Surety Company binds itself, its successors and assigns, firmly by these presents.

Sealed with the seal of the Title Guaranty and Surety Company, and dated the 11th day of March in the year of our Lord One Thousand Nine Hundred and Seven.

Whereas the above named Lathrop Shea & Henwood Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree lately rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Western District of New York.

162 Now therefore, the condition of this obligation is such that if the above named Lathrop Shea & Henwood Company shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[Seal The Title Guaranty & Surety Company.]

THE TITLE GUARANTY & SURETY COMPANY,
THOMAS J. OVERTURF,
*Attorney in Fact.*

163 STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

On this 11th day of March, 1907, before me personally came Thomas J. Overturf, Attorney-in-Fact of The Title Guaranty & Surety Company, a corporation created and existing under and by virtue of the laws of the State of Pennsylvania, and duly authorized to transact business in the State of New York, to me known, who being by me duly sworn, did depose and say that he resides in the City of Buffalo; that he is the Attorney-in-Fact of the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name to said instrument as Attorney-in-Fact of said Company by like order; that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3 of Chapter 720 of the Session Laws of the State of New York for the year 1893 and the Acts amendatory thereof and supplementary thereto, and that the following statement of the assets and liabilities of said Company on September 29, 1906, is true and correct, and that the financial condition of said Company is as favorable at this date as it was on said September 29, 1906.

[Seal Ida Horn, Notary Public, Erie County, N. Y.]

IDA HORN,
*Notary Public, Erie County, New York.*



89

Statement of the Condition of The Title Guaranty & Surety Company.

Home Office: Scranton, Penna.

At the Close of Business September 29, 1906.

| | | |
|---|---|---|
| Resources: | | |
| Cash on hand and in Banks | $28,198.48 | |
| Demand Collateral Notes | 82,925.00 | |
| Bonds | 1,061,377.14 | |
| Mortgages, etc. | 149,824.83 | |
| Real Estate | 90,000.00 | |
| Premiums in Course of Collection, Net | 94,763.80 | |
| Bills Receivable | 88,496.26 | |
| Accrued interest | 12,804.92 | |
| | | $1,608,390.43 |
| Liabilities: | | |
| Premium Reserve | $358,193.63 | |
| Reserve for Claims | 95,874.64 | |
| Reserve for payment of Taxes | 13,050.00 | |
| Capital stock, paid in | $793,000.00 | |
| Surplus over all liabilities | 348,272.16 | |
| Surplus as regards policy-holders | 1,141,272.16 | |
| | | $1,608,390.43 |

[Seal The Title Guaranty & Surety Company.]

COUNTY OF ERIE, *City of Buffalo, State of New York, ss:*

Thomas J. Overturf, Attorney-in-Fact of The Title Guaranty & Surety Company, being duly sworn, deposes and says, that the foregoing statement of the Assets and Liabilities of said Company on September 29, 1906, is true and correct, and that its financial condition is as favorable at this date as it was on September 29, 1906.

THOMAS J. OVERTURF,
*Attorney-in-Fact.*

Sworn to before me this 11th day of March 1907.

[Seal Ida Horn, Notary Public, Erie County, N. Y.]

IDA HORN,
*Notary Public, Erie County, New York.*

164 The Title Guaranty & Surety Company.

Scranton, Penna.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

On this 11th day of March 1907, before me personally came Thomas J. Overturf, Attorney-in-Fact of The Title Guaranty & Surety Company, a corporation created and existing under and by virtue of the laws of the State of Pennsylvania, and duly authorized to transact business in the State of New York, to me known, who being by me duly sworn, did depose and say that he resides in the City of Buffalo; that he is the Attorney-in-Fact of the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name to said instrument as Attorney-in-Fact of said Company by like order; that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3 of Chapter 720 of the Session Laws of the State of New York for the year 1893 and the Acts amendatory thereof and supplementary thereto, and that the following statement of the assets and liabilities of said Company on September 29, 1906, is true and correct, and that the financial condition of said Company is as favorable at this date as it was on said September 29, 1906.

[Seal Ida Horn, Notary Public, Erie County, N. Y.]

IDA HORN,
*Notary Public, Erie County, New York.*

At a regular meeting of the Board of Directors of The Title Guaranty & Surety Company, held at the office of the Company in Scranton, Penna., on the third day of February, 1906, on motion it was

Resolved, That this Company do and it hereby does authorize and empower Charles L. Gurney and Thomas J. Overturf, its Attorneys-in-Fact, and each of them, to execute and deliver and attach the seal of the Company to any and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed.

[Seal The Title Guaranty & Surety Company.]

COUNTY OF ERIE, *City of Buffalo, State of New York, ss:*

I, Thomas J. Overturf, Attorney-in-fact of The Title Guaranty & Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said resolution.

Given under my hand and the seal of the Company at the City of Buffalo this 11th day of March, A. D. 1907.

THOMAS J. OVERTURF,
*Attorney-in-Fact.*

165 Endorsed: U. S. Circuit Court, Western Dis. of N. Y. Lathrop Shea & Henwood Co. *vs.* Interior Construction and Improvement Company. Bond. J. H. Metcalf, Attorney for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y. Approved as to form & amount. John R. Hazel, U. S. J. U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 15, 1907. Harris S. Williams, Clerk.

166 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff,
*vs.*
INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant.

I hereby certify that this cause came before this Court at the Federal Building in the City of Buffalo, N. Y., upon an order returnable on the 18th day of December, 1906, at ten o'clock in the forenoon, requiring the plaintiff to show cause why the service of the summons upon the defendant herein should not be set aside, and a judgment rendered by default herein in the Supreme Court of the State of New York entered in the Erie County Clerk's office on the 27th day of September, 1905, for $47,363.15, in favor of the plaintiff and against the defendant, should not be vacated and declared null and void, and the complaint dismissed as against this defendant.

That the argument thereon was so held before this Court, Daniel J. Kenefick, Esq., and C. Walter Artz, Esq., appearing for the defendant in support of the motion to set aside the service of such summons, and J. Henry Metcalf, Esq., appearing for the plaintiff in opposition to said motion. That on the 30th day of January, 1907, the Court duly filed its decision herein, granting said motion to set aside the service of the summons and vacating the said judgment.

167 That it appears from the papers and affidavits on file and presented to this Court, that the cause of action was originally against the defendant The Interior Construction & Improvement Company and another defendant, The Pittsburg, Shawmut & Northern Railroad Company, jointly to recover monies for services performed and materials furnished in the year 1902, pursuant to contract: It being alleged in the complaint that the defendant The Construction Company acted as agent to the defendant Railroad Company. The summons was served upon the defendant, The Construction Company, by serving the same upon the Secretary of State of the State of New York, on the 16th day of November, 1904, as is provided by Section 16 of the General Corporations Law of the State of New York. The said defendant, The Interior Construction & Improvement Company being a foreign corporation, and service of said summons being made upon said defendant, pursuant to the said

Statute, by delivering same to the Secretary of State as therein provided. That before the expiration of the time to answer or demur, the defendant appeared specially and obtained an order requiring plaintiff on the 6th day of December, 1904, to show cause before the Special Term of the Supreme Court of the State of New York, in and for the County of Erie, at the Court House in the City of Buffalo, N. Y., why the service of the summons upon this defendant, by serving the same upon the Secretary of State, as provided by said Corporations Law, should not be set aside on the ground that at the time thereof, said defendant Construction Company was not doing business within the State of New York, and that its designation of one Mollenhauer as its agent, upon whom process was to be served, within
168 the State of New York, as provided by the said General Corporations Law, had in fact been revoked. Upon the return of said order, the plaintiff showed that the said agent so designated, had removed from the place designated, where service of process could be made upon this defendant, and that he could not be found. The Court, at such special term, decided that such service was regular and made in conformity with the General Corporations Law, and the motion to so set aside the summons and service thereof was denied by said Supreme Court, and an order denying same, was thereupon entered in the office of the Clerk of the County of Erie, New York. The said defendant Construction Company thereupon appealed from said order so entered to the Appellate Division of the State of New York, Fourth Judicial Department which appeal was duly argued and decided adversely to the defendant and the order denying the motion to set aside the service of the summons was duly affirmed: Thereupon the defendant applied to the Appellate Division for leave to appeal to the Court of Appeals of the State of New York. This application for leave to so appeal was thereafter duly denied.

The defendant's time to plead had in the meantime been duly extended and on the 6th day of February, 1905, a petition for the removal of said cause to the Circuit Court of the United States for the Western District of New York was duly presented by the defendant to the Supreme Court of the State of New York and the said cause was thereupon duly removed to this Court. Thereafter an order was made by this Court requiring the plaintiff to show cause why the service of the summons should not be set aside; the plaintiff also moved at the same time to remand the cause to the State Court; upon
169 the return of said motions, the arguments of the same being had together, this Court granted the plaintiff's motion to remand the cause upon the ground that there was no severable controversy stated in the complaint and the defendant's motion to set aside the service of the summons was denied. An order to this effect was duly entered on the 17th day of March, 1905. This defendant then obtained an order in the Supreme Court of the State of New York, requiring this plaintiff to show cause before said Court on the 31st day of March, 1905, why its time to appear or answer in this action should not be extended until twenty days after the determination of the motion then pending in the said Special Term of the Supreme Court, made in behalf of the defendant Railroad Company

to compel the plaintiff to elect which defendant it would proceed against in said action to the exclusion of the other; upon the return of said order, the motion of said defendant Construction Company was denied and also the motion to compel an election so made by the defendant Railroad Company. The issues raised by the defendant Railroad Company in this action had been referred to Charles B. Wheeler, Esq., as Referee, to hear, try and determine; upon the trial thereof, the said Referee dismissed the plaintiff's complaint as to the Railroad Company and judgment thereon was entered on the 26th day of October, 1905; this plaintiff thereupon appealed from said judgment of dismissal to the Appellate Division of the Supreme Court.

On the 27th day of September, 1905, the plaintiff herein applied to the said Supreme Court for judgment by default which was on that day upon proofs duly taken before a referee appointed by the Court, rendered against the defendant, the Construction Company for $47,363.15, and an execution was thereupon issued to the Sheriff of New York County, the County where the said Construction
170 Company had maintained its general office and said execution was returned wholly unsatisfied. Thereafter the defendant Construction Company upon petition again removed the cause to the Circuit Court of the United States for the Western District of New York, and upon an order duly granted by this Court and returnable October 31st, 1905, required the plaintiff to show cause why the service of the summons should not be set aside and the said judgment so entered thereon in the Supreme Court of the State of New York, vacated. Concurrently with said motion, plaintiff made a motion at said time to remand the cause to the State Court. These motions were argued together and on the 9th day of November, 1905, this Court denied the motion to set aside the service of the summons and granted plaintiff's motion to remand the cause to the State Court on the ground that this plaintiff had appealed from the judgment dismissing its complaint as to the Railroad Company which appeal was then pending in the Appellate Division of said Supreme Court, and there had not been a final determination of the question of the severable controversy. Orders denying said motion and remanding the cause to the Supreme Court were duly entered on the 2nd day of February 1906.

On the 4th day of December, 1906, the Appellate Division affirmed the judgment dismissing the plaintiff's complaint as against the defendant Railroad Company, and judgment of affirmance was entered thereon. Thereupon the defendant Construction Company for the third time removed the cause to this Court and an order requiring the plaintiff to show cause why the service of the summons should not be set aside and the said judgment vacated and declared null and void was returnable on the 18th day of December, 1906, as first hereinbefore stated.

171 This motion coming on to be heard, this Court granted said motion, and on the 5th day of February, 1907, a decree and order was granted by this Court, setting aside the service of the summons and vacating and declaring said judgment so entered by

default, in the Supreme Court of the State of New York for $47,-363.15, null and void, and dismissing the plaintiff's complaint for want of jurisdiction of the defendant the Interior Construction & Improvement Company.

I further certify that no evidence was introduced upon the hearing of said motion the issue being:

I. Whether this Court had obtained jurisdiction over this defendant by the service of a summons upon the Secretary of State of the State of New York as provided by Section 16 of the General Corporations Law of said State of New York.

II. Whether the proceedings in and the decisions of the Courts of the State of New York construing said Corporations Law, were controlling upon this Court.

III. Whether the proceedings taken by said defendant in said State Court are *res adjudicata* upon defendant.

The said issues were each decided in favor of the defendant and against the plaintiff herein as before set forth.

This certification is made in conformity to an Act of Congress of March 3rd, 1891, Chapter 517, and said question of jurisdiction being certified by me in this Certificate to the Supreme Court of the United States.

Dated Buffalo, N. Y., March 15th, 1907.

JOHN R. HAZEL, *U. S. J.*

172 Endorsed: U. S. Circuit Court, West. Dis. of New York.—Lathrop, Shea & Henwood Co. *vs.* Interior Construction and Improvement Company.—Certificate as to Jurisdiction.—J. H. Metcalf, Attorney for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 15, 1907 Harris S. Williams, Clerk.

173 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Western District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the order and decree, of a plea which is in the said Circuit Court before you or some of you between Lathrop Shea & Henwood Company, plaintiff, and the Interior Construction & Improvement Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Lathrop Shea & Henwood Company, as by its complaint appears,

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this Writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court to be then and there *heard*, that

the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct
174 that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 15th day of March 1907.

[Seal United States Circuit Court, Western District of New York.]

HARRIS S. WILLIAMS,
*Clerk of the Circuit Court of the United States for the Western District of New York.*

Allowed by:
J. R. H.

Endorsed: No. —. United States Circuit Court: Western District of New York: Lathrop Shea & Henwood Company *vs.* Interior Construction & Improvement Company Writ of error J. H. Metcalf, Attorney for Plaintiff, Office & P. O. Address, Nos. 688-96 Ellicott Sq., Buffalo, N. Y. Filed: ——.

175 [Endorsed:] United States Circuit Court Western District of New York Lathrop, Shea & Henwood Company, Plaintiff, *vs.* Interior Construction & Improvement Company, Defendant. Writ of error. J. H. Metcalf Attorneys for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 15 1907 Harris S. Williams, Clerk.

176 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Interior Construction & Improvement Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court for the Western District of New York, wherein Lathrop Shea & Henwood Company is plaintiff in error, and you are defendant in error, to show cause if any there be, why the order and decree rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Buffalo, in the District above named, this 15th day of M'ch in the year of our Lord One thousand nine hundred and Seven.

JOHN R. HAZEL,
*United States District Judge for the Western District of N. Y.*

177 [Endorsed:] United States Circuit Court Western District of New York. Lathrop, Shea & Henwood Company, Plaintiff, *vs.* Interior Construction & Improvement Company, Defendant. Cita-

tion of Writ of Error. J. H. Metcalf, Attorneys for Plaintiff, 688-694 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 15 1907 Harris S. Williams, Clerk.

178 United States Circuit Court, Western District of New York.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff-in-error,
*vs.*
INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant-in-error.

Due and personal service of the following papers in the above entitled cause, filed in the office of the Clerk of the Circuit Court for the Western District of New York on the 15th day of March, 1907, is hereby admitted:

Petition for Writ of Error.
Citation on Writ of Error.
Order allowing Writ of Error.
Assignments of Error.
Writ of Error.
Bond.
Certificate as to Jurisdiction.
Dated, New York, N. Y., March 15th, 1907.

G. WALTER ARTZ,
*Attorney for Defendant-in-error, Interior Construction & Improvement Company, Specially Appearing for Purposes of Motion Only.*

U. S. Circuit Court, Western dist. of N. Y. Filed Mar. 18, 1907. Harris S. Williams, Clerk.

179 Supreme Court of the United States.

LATHROP, SHEA & HENWOOD COMPANY, Plaintiff in Error (Plaintiff Below),
*against*
THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, Defendant in Error (Defendant Below).

It satisfactorily appearing that it will be impossible to complete and file the transcript of record on writ of error on the return day of the citation herein, it is hereby ordered that the time to file the said transcript of record be and the same is hereby extended thirty days from and after April 14th, 1907, the return day of said citation.

Dated April 11th, 1907.

JOHN R. HAZEL, *U. S. J.*

180 UNITED STATES OF AMERICA,
*Western District of New York, ss:*

I, Harris S. Williams, Clerk of the Circuit Court of the United States for the Western District of New York, do hereby certify the foregoing to be a transcript of the records of the Circuit Court in the cause named at the beginning thereof, made up pursuant to Rule VIII of the Rules of the Supreme Court of the United States.

In Testimony Whereof, I have hereunto signed my name and caused the seal of the said Court to be affixed at the City of Buffalo, in said District, the 25th day of April, 1907.

[Seal United States Circuit Court, Western District of New York.]

HARRIS S. WILLIAMS,
*Clerk U. S. Circuit Court, Western District of New York.*

Endorsed on cover: File No. 20,747. W. New York C. C. U. S. Term No. 98. Lathrop, Shea & Henwood Company, plaintiff in error, *vs.* Interior Construction & Improvement Company. Filed May 28th, 1907. File No. 20,747.

Office Supreme Court, U. S.
FILED.
OCT 22 1909
JAMES H. McKENNEY,
Clerk.

IN THE

# SUPREME COURT OF THE UNITED STATES

LATHROP, SHEA & HENWOOD COMPANY,
*Plaintiff in Error.*
(Plaintiff below.)

against

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
*Defendant in Error.*
(Defendant below.)

No. 2.

## BRIEF FOR PLAINTIFF IN ERROR

CLARENCE M. BUSHNELL,
*Attorney for Plaintiff in Error,*
917 Chamber of Commerce,
Buffalo, N. Y.

CLARENCE M. BUSHNELL,
*of Counsel.*

PRESS OF THE BATAVIA TIMES, BATAVIA, N. Y.

# SUPREME COURT OF THE UNITED STATES

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LATHROP, SHEA & HENWOOD COMPANY,
*Plaintiff in Error,*
(Plaintiff below).

against

THE INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY,
*Defendant in Error,*
(Defendant below).

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## STATEMENT.

This cause comes to this Court upon a writ of error from the Circuit Court of the United States for the Western District of New York, allowed pursuant to a certificate that the jurisdiction of the Court was in issue made by Honorable John R. Hazel, United States District Judge for the Western District of New York, in conformity to Section 5, Chapter 517, of the Act of Congress of March 3, 1891.

## FACTS.

The plaintiff in error is a corporation organized under the laws of the State of New York. The defendant in error is a corporation organized under the laws of the State of New Jersey.

This action was commenced in the Supreme Court of the of State of New York, Erie County, by the service of the summons and complaint upon the defendant in error, the Interior Construction & Improvement Company, by serving the same upon the Secretary of State for the State of New York pursuant to Section 16 of the General Corporation Law of the State of New York.

April 1, 1899, defendant in error filed with the Secretary of State of the State of New York the papers and statements required under Section 16 of the General Corporation Law of that State, and designated Frederick H. Mollenhauer, 45 Wall Street, New York City, as the person upon

whom process against the corporation may be served within the state. This was accompanied with the consent of said Mollenhauer. The certificate permitting the corporation to transact business within the State of New York as provided by Section 15 of said General Corporation Law, was thereupon duly issued to said corporation. (120).

Prior to June 1st, 1902, the defendant in error made and entered into a contract with the Pittsburgh, Shawmut & Northern Railroad Company for the construction of its railroad in the States of New York and Pennsylvania, and thereafter the defendant in error entered into a sub-contract for the construction of said railroad with the plaintiff in error, and during the years 1902, 1903 and the early part of 1904, the work of construction was carried on by said defendant in error within the State of New York and completed in the summer of 1904.

November 17, 1903, defendant in error brought an action in the Supreme Court of the State of New York, Alleghany County, against Winfield MacLane, who was a contractor for the construction of said railroad under said defendant in error. The defendant in said action duly answered, to which the plaintiff therein served its reply. The action being thus at issue was continued upon the calendar of the Trial Term for the County of Alleghany and appeared upon said calendar as late as the term beginning June 12, 1905, and was still pending in said Court as late as November 16, 1905, a year subsequent to the service of the summons and complaint herein upon the Secretary of State. (103, 122.)

Prior to the service of the summons and complaint herein upon the Secretary of State, effort had been made to serve the same since the 8th of September, 1904, upon the defendant in error at 45 Wall Street, New York City, its office or principal place of business within the State. Subsequently the process server made effort to serve the same upon Frederick H. Mollenhauer, the person designated pursuant to Section 16 of the General Corporation Law, at 45 Wall Street, New York City, the address given in said designation. The process server found the name of both Mollenhauer and the defendant in error on the bulletin board in the public hall of 45 Wall Street, and the statement that they were both to be found on the sixth floor in Rooms 65 and 67. On inquiry there he was informed that no person connected with the defendant in error was about and that said Mollenhauer had not been at the offices since the Spring before, and they did not know where he was. The process server made other futile efforts to find said Mollenhauer, who had so removed from 45 Wall Street, the place where the corporation had its principal place of business within the State of New York. (117-120.)

November 14, 1904, defendant in error filed in the office of the Secretary of State a revocation of Mollenhauer's consent to the designation made by the defendant in error as the person upon whom process against the corporation could be served within the State of New York. (111-113). This revocation was made pursuant to Section 432 of the Code of Civil Procedure and not as provided by Section 16 of the Statute.

November 30th, 1904, the defendant in error appearing specially by counsel, upon affidavits, obtained an order requiring plaintiff in error to show cause before a Special Term of the Supreme Court of the State of New York to be held at the City of Buffalo on the 2nd of December, 1904, why service of the summons on the Secretary of State of the State of New York, should not be set aside upon the ground that it was improper and invalid for the reason that the Interior Construction & Improvement Company had ceased to do business and removed its office from the State of New York before the attempted service of the summons, and after it had removed its office from the State and, before the attempted service, Frederick H. Mollenhauer, the person designated upon whom summons and other process might be served within the State, made and executed and filed a revocation of consent and no other designation had thereafter been made, and that conditions under which service could be made upon the Secretary of State as provided by Section 16 of the General Corporation Law did not exist in this case, and there was no ground upon which service could be made upon the Secretary of State as upon the defendant, The Interior Construction & Improvement Company. This motion was heard and denied at the Special Term upon the moving affidavits and the affidavits read in opposition to the motion, and an order so denying the motion with costs was thereupon duly entered. (107-138.)

From the order granted at Erie Special Term denying the motion the defendant in error appealed to the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The appeal was heard at the Appellate Division at the January Term, 1905, and the order appealed from was unanimously affirmed by that Court. At the same term the defendant in error moved before the said Appellate Division for leave to appeal to the Court of Appeals of the State of New York, which motion was unanimously denied by the said Appellate Division. This was a final determination of the question by the highest State Court capable of passing upon the same. Sec. 190, Sub-d. 2, N. Y. Code of Civ. Pro.

February 6th, 1905, the defendant in error by petition made by counsel specially appearing for the purpose of presenting the petition, moved the cause from the Supreme Court of the State of New York to the United States Circuit Court for the Western District of New York on the ground of a separable controversy. February 19th, counsel for defendant in error specially appearing and upon the same affidavits upon which the motion in the State Court was denied obtained an order from District Judge John R. Hazel requiring the plaintiff to show cause before the United States Circuit Court for the Western District of New York on the 14th of February, 1904, why the service of the summons upon the defendant should not be set aside as it was irregular and void. The plaintiff in error also obtained an order requiring the defendant in error to show cause at the same time why the case should not be remanded to the State Court as it was not properly removable to the Federal Court. March 6th, 1905. Judge Hazel filed a decision and opinion granting the motion of the plaintiff in error to remand the cause to the State Court on the ground that there was not a severable controversy and denying the motion of the defendant in error to dismiss the substituted service of process. (86.) Refer 135 Federal Reporter 619.

March 27th, 1905, defendant in error by its counsel appearing specially for the purpose of the motion, obtained an order requiring plaintiff in error to show cause before the Special Term of the Supreme Court for the State of New York why the time of the defendant, The Interior Construction & Improvement Company, to appear and answer or otherwise plead therein should not be extended twenty days after the determination of proceedings against The Pittsburgh, Shawmut & Northern Railroad Company, its co-defendant in said action. On the return of said order to show cause, the motion of the defendant in error was denied with costs. (87.)

September 25, 1905, the plaintiff in error applied to the Supreme Court of the State of New York for judgment by default against the defendant in error, who had not appeared or answered or demurred to the plaintiff's complaint although more than twenty days had elapsed since the service of the summons and complaint upon the Secretary of State as aforesaid. A referee was duly appointed by the Supreme Court to take proof of the cause of action set forth in the plaintiff's complaint and to examine the plaintiff, its attorneys or agents, on oath, respecting any payments made upon the amount claimed due the plaintiff under said complaint. A hearing was had before the referee and proof to sustain the cause of action was duly made and

upon confirmation of the referee's report, judgment was ordered in favor of the plaintiff in error and against the defendant in error for $47,323.91, and which judgment on the 27th of September, 1905, was duly entered in Erie County Clerk's office for that amount, together with $39.24, costs and disbursements, amounting in all to $47,363.15. Execution was thereafter duly delivered to the sheriff of New York County, where the defendant last had a general office and place of business within the State of New York, and said execution was duly returned by the sheriff on the 4th of October, 1905, wholly unsatisfied and unpaid. (88.)

October 30th, 1905, defendant in error on petition of its counsel specially appearing, presented his petition and said cause was again removed from the Supreme Court of the State of New York to the Circuit Court of the United States for the Western District of New York. November 1st, 1905, defendant in error, upon the same affidavits used on the motion in the State Court obtained an order requiring the plaintiff in error to again show cause before the United States Circuit Court why the service of the summons upon the Secretary of State for The Interior Construction & Improvement Company should not be set aside and declared null and void, and the judgment entered thereon vacated. The plaintiff in error obtained an order requiring the defendant in error to show cause at the same time why the proceedings for the removal of said cause should not be set aside and vacated and the cause remanded to the Supreme Court of the State of New York upon the ground that the proceeding for the removal of the cause was irregular, illegal and void. February 2, 1906, on the hearing of said motions the cause was remanded to the State Court upon the ground that the appeal to the Appellate Division of the Supreme Court of the State of New York from the judgment of dismissal as to the co-defendant, the Pittsburgh, Shawmut & Northern Railroad Company, was then pending and that this removal was premature. (82.)

December 4, 1906, defendant in error on petition by its counsel specially appearing, again removed the cause from the Supreme Court of the State of New York to the Circuit Court of the United States for the Western District. (3-10.) On the same day upon the same affidavits upon which the first motion was made to set aside the service of the summons which was denied in the Supreme Court of the State of New York, and the additional affidavit of counsel for defendant in error explaining the reasons for the Court remanding the cause to the State Court on the last hearing,

an order was made requiring the plaintiff in error to show cause why the service of the summons upon the Secretary of State should not be set aside and the judgment entered thereon vacated. (80, 84.) This motion was opposed upon all the affidavits and proceedings had and filed in the Supreme Court of the State of New York and on the previous hearings in the Circuit Court. (153.) February 5, 1907, the Circuit Court granted the motion, setting aside the service of the summons upon the defendant in error by the service of the same on the Secretary of State and vacating the judgment entered by default in the Supreme Court of the State of New York and dismissing said action for want of jurisdiction of said defendant. (152-154.) The opinion of Judge Hazel upon this motion is reported 150 Fed. Rep., 666; also 142-151 of the record.

The issues upon the hearing of said motion, as appears by the certificate of jurisdiction granted by Judge Hazel are:

"I. Whether this Court had obtained jurisdiction over this defendant by the service of a summons upon the Secretary of State of the State of New York as provided by Section 16 of the General Corporations Law of the State of New York.

"II. Whether the proceedings in and the decisions of the Courts of the State of New York construing said Corporations Law, were controlling upon this Court.

"III. Whether the proceedings taken by said defendant in said State Court are *res adjudicata* upon the defendant."

The certificate of jurisdiction will be found 166-173 of the record.

The assignments of error (157-158) are:

"I. The Circuit Court Judge erred in deciding that the proceedings in the State Court are not *res adjudicata.*

"II. The Circuit Court Judge erred in deciding that the service of summons upon the Secretary of State pursuant to Section 16 of the Corporations Laws of New York was not a service upon the defendant.

"III. The Circuit Court Judge erred in deciding that the said service of summons was null and void as to the defendant and that therefore it was not within the jurisdiction of the State Court or of this Court.

"IV. The Circuit Court Judge erred in deciding that the judgment rendered by default herein against the defendant is null and void.

"V. The Circuit Court Judge erred in ordering the service of summons to be set aside and the judgment thereon be vacated and set aside."

This is a most unblushing effort to evoke a technicality to avoid an admitted liability. The defendant in error admits that it employed plaintiff in error to perform the service claimed. (134). The defendant in error was during all that time transacting business in the State of New York under permission which it took affirmative steps to obtain. (120). The plaintiff in error on September 8, 1904, commenced to make efforts to serve its process on the defendant in error within this State and pursued its efforts so to do (117-119) until on the 14th day of November, 1904, the person designated by the defendant in error upon whom service could be made within this State filed with the Secretary of State his revocation of consent to be served (111-112). The efforts to serve and the date of revocation show an unquestioned connection. Therefore, in all fairness the Court should not be diligent to discover a technicality which will make the defendant's judgment void.

## POINTS.

### I.

### The Circuit Court Judge erred in deciding that the service of the summons upon the secretary of State pursuant to section 16 of the general corporation law of New York was not a service upon the defendant.

(Second assignment of error).

The question in this assignment of error is whether the service of summons upon the Secretary of State was within the provisions of the Statute of the State of New York.

Section 15 of the General Corporation Law of the State of New York provided under what conditions a foreign corporation might be authorized to do business within the State of New York. (New York Laws of 1892, Chapter 687, Section 15).

Section 16 of the State Law (New York Laws of 1892, Chapter 687 Section 16, as amended by Laws of 1895, Chapter 672) provides:

> "Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy in the English language of its character or certificate of incorporation and a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it pro-

poses to carry on within the State, and a place within the State which is to be its principal place of business, and designating in the manner prescribed in the Code of Civil Procedure a person upon whom process against the corporation may be served within the State. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the State. Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this State. *If the person so designated dies or removes from the place where the corporation has its principal place of business within the State, and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State,* the Secretary of State may revoke the authority of the corporaion to do business within the State, *and process against the corporation in an action upon any liability incurred within this State before such revocation, may, after such death or removal, and before another designation is made, be served upon the Secretary of State.* At the time of such service the plaintiff shall pay to the Secretary of State two dollars to be included in his taxable costs and disbursements, and the Secretary of State shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him."

The defendant in error filed the sworn statement required by Section 16 and a certificate of authority to transact business within the State was issued to it April 1st, 1899. (119-120.) As early as the 1st day of June, 1902, it entered actively into the transaction of business within the State and by its own admission continued the same until the 3rd day of August, 1904. (66.) During that time, it employed the plaintiff in error to perform the services sued upon in this action, (Fol. 66), all of which were performed within the State of New York. (16-17.) In its statement prerequisite to its authority to transact business aforesaid, the defendant in error had designated one Frederick H. Mollenhauer as the person upon whom service of process could be made within the State of New York. (120.) September 8th, 1904, the plaintiff in error commenced a campaign to make service upon the defendant in error of the summons

in the State Court. The process server went to No. 45 Wall Street which was the office of the Company within the State of New York and, although the name of the defendant appeared on the bulletin in the public hall with the statement that it was to be found on the Sixth Floor at Rooms 65-67, no person in those rooms would acknowledge any connection with it. On the 27th day of October, the process server wrote to the Secretary of State of New York requesting the name of the person designated by the defendant in error upon whom service could be made within the State. When he learned that Frederick H. Mollenhauer was the man, he again went to 45 Wall Street and found Mollenhauer's name on the bulletin board with the information that he also was to be found at Rooms 65-67. Upon inquiry at that place, he was told that Mollenhauer was not connected with the defendant in error; that he had not been at the office since the Spring before but that he might be found at the Cuban Steamship Company, 32 Broadway. Upon calling at 32 Broadway he was told that Mollenhauer called there at regular intervals but that his whereabouts were unknown. The New York directory for that year did not contain Mollenhauer's name, although the directory for the year previous had contained it. (117-119.) On the 14th day of November, 1904, Mollenhauer filed in the office of the Secretary of State, a revocation of his consent to be served with process. (111-112.) It will be noted that Mollenhauer does not assume to designate any person to take his place. On the 16th day of November, 1904, the summons in the State Court was served upon the Secretary of State of New York. (10).

None of the above facts is questioned and the defendant in error does not assume to explain any adverse inferences to be drawn from these facts. It contents itself with showing that it had completed the particular contract upon which it was engaged within the State of New York on the 3rd day of August, 1904, and that it had adopted a resolution on the 4th day of August, 1904, removing its office from New York to Detroit and it rests upon the bald statements of its officers and employees that it was no longer transacting business within the State at the time of the service.

(a) Admitting for the sake of argument that actually the defendant in error had ceased to do business within the State of New York at the time of the service of the summons, it was still under the conditions attached to its original grant of permission constructively doing business within the State and as such was bound by the service of the Summons as

made and by such service, the State Court and in its turn, the Circuit Court of the United States obtained jurisdiction.

Section 16 of the General Corporation Law of the State of New York above quoted provides that a foreign corporation as a prerequisite to do business within the State of New York must file a statement "*setting forth * * * a place with-*
"*in the State which is to be its principal place of business.*"
It is not disputed that this place was at No. 45 Wall Street in the City of New York. (67.) Section 16 above also provides "*The person so designated,* (upon whom process "is to be served), *must have an office or place of business at*
"*the place where such corporation is to have its princpal*
"*place of business within the State.*" Mollenhauer, who was designated, did have such office. (117-118.) Section 16 above further provides, "*Such designation shall continue*
"*in force until revoked by an instrument in writing designat-*
"*ing in like manner some other person upon whom process*
"*against the corporation may be served in this State.*"
The attempted revocation did not designate any other person upon whom process could be served (60) so that the original designation of Mollenhauer was in force at the time of the service on the Secretary of State. Section 16 above further provides, "If the person so designated *dies or re-*
"*moves from the place where the corporation has its prin-*
"*cipal place of business within the State* and the corporation "does not within thirty days after such death or removal "designate in like manner another person upon whom pro-"cess against it may be served within the State, the Secre-"tary of State may revoke the authority of the corporation "to do business within the State and *process against the cor-*
"*poration in an action upon any liability incurred within*
"*this State before such revocation may after such death or*
"*removal be served upon the Secretary of State.* It is "undisputed that Mollenhauer, the person designated, re-"moved from the place where the defendant had its office "more than thirty days before this servicce." (See facts at beginning of this point).

Section 432 of the Code of Civil Procedure of New York provides:

> "Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:
>
> 1. To the president, treasurer, or secretary; or if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the Secretary of State. The designation must specify a place within the State, as the office or residence of the person designated; and if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the place specified as his office, or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The Secretary of State may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or managing agent of the corporation, within the State."

This section is not in conflict with section 16 of the General Corporation Law but is *in pari materia*. The provisions of section 16 wholly control as it is section 16 which permits the corporation to transact business within the State and provides in what manner the designation shall be made, the way it can be revoked and the effect of continuing the designation in force; while section 432 only provides that service may be made upon an officer of the corporation, the person designated, or, on failure to find either, upon the managing agent within the State. A resignation under section 432 does not relieve the corporation from the necessity of redesignating another person as provided by section 16.

The Court below says (page 84 of record) "It was unquestionably within the power of the legislature to impose "restrictive conditions as a prerequisite to defendant's "right to transact business in this State; for instance it

"could have provided that service of process upon the Sec-
"retary of State should be constructive service upon a de-
"fendant during the existence of any outstanding liabilities
"in the State, the corporation having withdrawn its business
"therefrom *but such is not the provision of the Statute.*"

The highest State Court has however held that the statute does contain just this provision and it being a question of the construction of a statute of the State of New York, this Court and the Court below are bound by that decision. Furthermore, if Section 16 above does not permit the service of process against the defendant in error upon the Secretary of State, it is entirely meaningless. It has no effect whatever and there could have been no object or purpose in engrafting these provisions into the Statute.

It requires no extended argument to show that the intention of the framers of the Statute was to provide for this identical situation and permit service upon the Secretary of State. Here the liability incurred arose under contracts between the parties to this action which were in force from June 14th, 1902, to December 1903 (17-23) and the liability thereby incurred was incurred within this State long before the removal of Mollenhauer in the Spring of 1904 or his attempted revocation in November, 1904. The defendant in error was permitted to come within the State of New York, transact its business and gain the benefits and advantages to which a citizen of this State is entitled only upon condition of its complying with the conditions named in the Statute, that it must designate a person upon whom process may be served so that citizens of the State of New York would not be compelled to go to a foreign state to enforce contracts that it had made within this State. If the person designated removes from the place of business and the corporation does not designate another person, the Statute provides for the service of process upon the Secretary of State. The only purpose of this provision of the Statute is to prevent a corporation, which has been allowed to transact business within the State and has violated its contract, escaping liabilities from the Courts of the State by ceasing to do business within the State. This is exactly what the defendant in error attempted to do here. This provision as to service upon the Secretary of State is a lasting and continuing one, so long as the action is upon any liability incurred within this State before such revocation. This continues although the Secretary of State had exercised his prerogative and actually revoked its right to do business within the State.

The defendant in error cannot escape this service upon the Secretary of State by removing its goods and ceasing to do business within this State so long as its liability to the plaintiff in error continues.

(b) All jurisdictions are unanimous in their holding that where a foreign corporation is authorized to do business within the State and as a condition is required to file a consent that service of process made upon the person designated or an officer of the State, it becomes a condition precedent and, if the Statute contemplates that the process may be served so long as any liability continues that the Company is powerless to revoke such contract or by withdrawing their business from the State, defeat the conditions of the consent.

In Mutual Reserve Funds Life Ass'n v. Phelps, 190 U. S. 147, the Court says, "The plaintiff was a citizen of Kentucky "and the cause of action arose out of transactions had be- "tween the plaintiff and the defendant while the latter was "carrying on business in the State of Kentucky under li- "cense from the State. Under these circumstances, the "authority of the insurance commissioner to receive Sum- "mons in behalf of the association was sufficient. Such was "the ruling of the Court of Appeals of Kentucky. Home "Benefit Society v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520. "In that case the Society while doing business in the State "issued the policy sued on but in April, 1894, *before the "action was brought, ceased to do business.*"

In Pennoyer v. Neff, 95 U. S. 714, the Court says: "Neither do we mean to assert that a State may not require "a non-resident entering into a partnership or association "within its limits or making contracts enforceable thereto "appoint an agent or representative in the State to receive "service of process and notice in legal proceedings insti- "tuted with respect to such partnership, association or con- "tracts or to designate a place where such service may be "made and notice given and provide upon their failure to "make such appointment or to designate such place that "service may be made upon a public officer designated for "that purpose or in some other prescribed way and that "judgments rendered upon such services may not be bind- "ing upon the non-residents both within and without the "State. As was said by the Court of Exchequer in Valle v. "Dumerque, 4 Exch. 290, 'It is not contrary to natural jus- "tice that a man who has agreed to receive a particular "mode of notification of legal proceedings should be bound "by a judgment in which that particular mode of notifica- "tion has been followed * * *.'"

In St. Clair v. Cox, 106 U. S. 350, the Court says: "A "corporation of one State cannot do business in another "State without the latter's consent, express or implied, "and that consent may be accompanied with such conditions "as it may think proper to impose. As was said by this "Court in Insurance Co. v. French, 'These conditions must "be deemed valid and effectual by other States and by this "Court, provided they are not repugnant to the Constitu- "tion or Laws of the United States nor inconsistent with "those rules of public law which secure the jurisdiction and "authority of each State from encroachment by others or "that principle of natural justice which forbids condemna- "tion without opportunity for defense * * *.' The "State may therefore, impose as a condition upon which a "foreign corporation shall be permitted to do business "within her limits that it shall stipulate that in any litiga- "tion arising out of its transactions in the State, it will ac- "cept as sufficient the service of process on its agents or "persons specially designated; and the condition would be "eminently fit and just. And such condition and stipula- "tion may be implied as well as expressed. If a State per- "mits a foreign corporation to do business within her lim- "its and at the same time provides that in suits against it, "for business there done, process shall be served upon its "agents, the provision is to be deemed a condition of the "permission; and corporations that subsequently do busi- "ness in the State are to be deemed to assent to such condi- "tion as fully as though they had specially authorized their "agents to receive service of the process."

See also Conn. Mutual Life Insurance Co., v. Spratley, 172 U. S., 602,
Collier v. Mutual Reserve Fund Life Ass'n, 119 Fed. Rep., 617,
Swan v. Mutual Reserve Fund Ass'n, 100 Fed. Rep., 932,
Woodward v. Mutual Reserve Life Ass'n, 178 N. Y., 485,
Hunter v. Mutual Reserve Life Insurance Co., 184 N. Y., 136,
Hunter v. Mutual Reserve Fund Life Ass'n, 192 N. Y., 85,
Johnston v. Mutual Reserve Fund Life Ass'n, 104 App. Div., (N. Y.) 544,
Lafayette Insurance Co., v. French, 59 U. S., 404,
Sparks v. Nat'l Masonic Ass'n, 73 Fed. Rep., 276,
McGoffin v. Associations, 91 N. W., 1115,
Cotton v. Yates, 63 S. W., 997.

The defendant in error only replies that at the time of the service it had ceased to do business within the State but we submit that having theretofore transacted business within the State under a license, a prerequisite of which was consent to submit to service upon the Secretary of State for liabilities based upon business done within the State, they were estopped from claiming they had ceased to do business within the State; or, if they were not so estopped, they will be held to have agreed to accept such service, in any event.

(c) The defendant in error was doing business within the State of New York as late as November 16th, 1905, a year subsequent to the service of the summons and complaint.

November 17th, 1903, defendant in error brought an action in the Supreme Court of the State of New York, Alleghany County against Winfield MacLean who was a contractor for the construction of said railroad under said defendant in error. The defendant in said action duly answered, to which the plaintiff therein served its reply. The action thus at issue was continued upon the calendar of the trial term for the County of Alleghany and appeared upon that calendar as late as the term beginning June 12th, 1905, and was still pending as late as November 16th, 1905, a year subsequent to the service of the summons and complaint herein upon the Secretary of State. (103-122).

Defendant's right as a foreign corporation to bring this MacLean action in the Courts of this State was dependent upon Section 15 of the General Corporations Law which is the section which requires a foreign corporation to first obtain the certificate of the Secretary of State before it is permitted to transact any business within this State and which certificate this defendant did obtain. Section 15 of the General Corporation Law provides, "No foreign stock "corporation doing business in this State shall maintain "any action in this State upon any contract made by it in "this State unless prior to the making of such contract, it "shall procure such certificate."

It is clear that this defendant as a foreign corporation could not have commenced this action against MacLean upon this contract had this defendant not procured the certificate of the Secretary of State permitting it to transact business. If it were necessary for this defendant to have this certificate to commence and maintain this action, could it withdraw its office and cease doing business as claimed in the moving affidavits and still maintain and continue this MacLean action? It takes no argument to prove that so long as corporation continued to receive benefits from this certifi-

cate of authority to transact business within the State of New York, the conditions attached to that authority were still in force.

The precedent cited by the Court below as authority for the propositions that the bringing of an action by a foreign corporation in the Courts of another State does not constitute doing business there, are not at all applicable. Those cases are Pennsylvania Collieries Co. v. McKeever, 183 N. Y. 103, U. S. v. American Bell Telephone Co., 29 Fed. Rep. 37, Buffalo Glass Co. v. Manufacturers Glass Co., 142 Fed. Rep. 273, Hunter v. Mutual Reserve Life Insurance Co., 189 N. Y. 130, Cady v. Associated Colonies, 119 Fed. Rep. 420. In but one of these cases had the foreign corporation been licensed under conditions making service upon a State officer good service upon the corporation and in but one of them had the foreign corporation theretofore done any business within the State by authority of the State. It is quite a different question as to whether a corporation *continues* a business already admittedly being done and as to whether a foreign corporation which has never taken any affirmative step to be permitted to do business, has actually *done* business.

In Hunter v. Mutual Reserve Life Ass'n, 184 N. Y. 136, which is the only case cited by the Court below in which a license had been obtained by the foreign corporation, the New York Court of Appeals only holds that the power of attorney required from foreign corporations permitting service upon a State officer is revocable and that after such revocation no action can be so brought in that State upon a claim incurred *elsewhere*.

But the Court expressly says (145): "The citizens "of North Carolina who had taken contracts from the de- "fendant while it was there doing business in reliance upon "this power of attorney which had been executed for their "protection under the requirements of the Statute, were "entitled to have it remain unrevoked, as provided by its "terms. As we have already seen, they are to be regarded "as having made their contracts upon the faith of it and "as against them, defendant could not escape from its con- "sequences."

## POINT II.

**The Circuit Court Judge erred in deciding that the proceedings in the State Court are not res adjudicata.**

## FIRST ASSIGMNENT OF ERROR

The defendant in error to be relieved from the service of the summons instituted four separate and distinct proceedings in the Supreme Court of the State of New York:

(1) A motion to the Supreme Court at Special Term to set aside the service of the summons.

(2) An appeal from the decision of the Special Term denying that motion to the Appellate Division, which unanimously affirmed the order of the Special Term.

(3) A motion to the Appellate Division for leave to appeal to the Court of Appeals, which was unanimously denied.

(4) A motion to the Special Term made after the cause was first removed to the Federal Court and by that court remanded to the State Court, to extend its time to answer twenty days beyond the time when the plaintiff should elect whether to proceed against the defendant in error or its co-defendant, the railroad company. This motion was denied.

The motion to set aside the service of the summons made in the first instance at the Special Term of the Supreme Court of the State of New York was made upon the identical affidavits and papers upon which the court below set aside the service of the summons upon the Secretary of State and vacated the judgment entered in favor of the plaintiff in error. This motion in the State Court brought up for consideration every question that was raised or considered by the court below, and the determination of the Special Term, of the State Court, affirmed by the highest tribunal of the courts of the State of New York by which the decision of the Special Term could be reviewed, is binding and conclusive upon the defendant in error, and the question is *res adjudicata.*

Duncan v. Gegan, 101 U. S., 810.

Lookout Mountain Railway v. Houston, 44 Fed. Rep., 449.

Bragdon v. Perkins-Campbell Co., 82 Fed. Rep., 338.

Allmark v. Platt SS. Co., 76 Fed. Rep. 516.

The principle of law is well settled, as stated by Chief Justice Waite in Duncan v. Gegan, supra.

> "The transfer of the suit from the State Court to the Circuit Court did not vacate what had been done in the State Court previous to the removal. The Circuit Court when a transfer is effected takes the case in the condition it was when the State Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had remained there. It takes the case up where the State Court left off."

The Court below in its decision ignores this principle of law and undertakes to decide *de novo* the question presented by the moving affidavits as though it had never been passed upon or considered by the courts of the State of New York.

The principle sustained by the cases above cited is well expressed by Judge Key in Lookout Mountain Railway Company v. Houston, 44 Fed. Rep., 449.

There the defendant's demurrer was sustained by the Chancellor. The Supreme Court of the State, the highest judicial tribunal, reversed the action of the Chancellor, and the case was then removed to the Federal Court. Judge Key, after reviewing the facts and the decisions upon the question, at bottom of page 451 says:

> "The final judgment or decree of the highest court of the State may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error as from a Circuit Court of the United States. A District or Circuit Court of the United States has no appellate or supervisory authority over any decision, decree or judgment of a State Court; nor does the Supreme Court of the United States have such except as provided in the 25th section of the judicial act referred to and the Act of 1867. Besides the decisions mentioned, there are numerous decisions of the Federal courts—an unbroken line—to the effect that the judgments and decrees of the State courts cannot be reviewed or supervised by the Federal Courts except where a writ of error lies as above indicated. This court is bound to respect the decision of the Supreme Court of a state in its judgment in regard to the demurrer, and regard it as a determination binding upon this Court even though it might be erroneous."

The Court below in its opinion (146) endeavored to distinguish some of the cases above cited. In the *Perkins-Campbell* case upon the ground that the defendant had appeared in the State Court and after the case was removed no new or different facts were elicited than had been already passed upon by the State Court, and it was accordingly held that as a lack of jurisdiction was not disclosed by the facts, the Circuit Court was concluded by the decision of the State Court. In the Allmark case that the record discloses that the question decided by the State Court was simply whether the service in fact was made upon the managing agent. Upon conflicting affidavits, the State Court decided that the defendant was doing business in the state and the person served was its agent.

The State Court in the case at bar passed upon all the questions of fact raised by the moving affidavits. The conclusion of the State Court that service upon the Secretary of State was a valid and sufficient service upon the defendant in error was the conclusion and determination of the State Court upon the facts presented by the moving affidavits, and that determination of the State Court, affirmed by the highest tribunal of the State of New York, became a determination binding upon the Federal Court and precluded the Federal Court within all the rules of comity and the decisions of every Court which has passed upon the question from deciding the questions which have already been decided by the State Court.

The distinction made by the Trial Court in the *Perkins-Campbell* case that there had been a general appearance by the defendant does not seem to be borne out by the record in that case. It appears from the opinion of Judge Acheson that the defendant presented to the State Court its original petition praying for a rule on the plaintiff to show cause why the sheriff's return of the service of the writ of summons should not be set aside. The rule was granted. The plaintiff filed an answer denying the material averments of the petition; depositions were taken on both sides, a hearing on the merits and the Court discharged the rule. The case was then removed to the Federal Court, a rule again obtained requiring the plaintiff to show cause why the service of the summons should not be set aside. The hearing on the rule was the same as that upon which the State Court had passed, excepting a new deposition containing cumulative evidence in support of its allegation. It is Judge Acheson's opinion on the return of this rule upon which we rely.

This case was not decided nor can the decision be distinguished upon the ground that there was an appearance in the action by the defendant in the State Court. The appearance was by the special rule and must have been a special appearance as there is here. The principle of this decision in the *Perkins-Campbell case*, as well as the decisions in the *Lookout Mountain* case, (44 Fed. Rep., 449), where defendants had appeared and demurred; in *Duncan v. Gegah*, (101 U. S., 810), in which the parties had generally appeared and litigated the questions in the State Court, are held to be binding on the Federal Courts not upon the ground that there was a general appearance, but upon the ground that from the same facts appearing in the Federal Court as appeared in the State Court, the decision of the State Court under the rule of comity is binding upon the Federal Court.

The defendant in error gains no advantage here because it appeared specially in the State Court for the sole purpose of raising the question of the validity of the service of the summons. The defendant in error has entered that special apearance every time that it has been before either court and so appeared on the hearing of the motion below. It was the only way in which it could appear and raise this question without submitting itself to the jurisdiction of the Court, and protect itself against the admission that the service of the summons was regular and valid.

The defendant in error invoked the aid of the State Court and submitted itself to that jurisdiction for the purpose of setting aside the service of the summons by specially appearing in that Court fully as much as though it had appeared generally in the action and submitted itself to the jurisdiction of that Court for any purpose. The determination of the State Court under the special appearance of the defendant is binding upon the defendant in error as though there had been a general appearance and precludes it from again raising in the Federal Court the same questions decided in the State Court.

The defendant in error is not relieved from the rules of *res adjudicata* because it specially appeared in the State Court, for that rule obtains because that Court determined the question of law upon the facts submitted by the defendant in error before that tribunal. It is not a question of appearance but a question of judicial determination, and the rule applies because of the determination. The defendant in error could not have raised the question of validity of the service of the summons unless it had protected its rights by appearing specially to raise that question. So this case cannot be distinguished from the cases cited upon

the ground that here there is only a special appearance, while in the case relied upon there may have been a general appearance.

The Allmark case the Court below endeavors to distinguish because it decides that after the denial of the motion to set aside the service of the State Court the motion cannot be renewed in the Federal Court without obtaining leave to do so, and an examination of the record in the case indicates that the question decided in the State Court was simply whether the service in fact was made upon a managing agent, which the State Court decided had been done. This does not distinguish that case from the case at bar. Here the identical affidavits were presented at the State Court upon which the motion was granted in the Federal Court. The State Court decided all of the facts which the Court below decided and determined as a matter of law, that the service upon the Secretary of State was legal and binding upon the defendant in error. No claim is made that any leave has been granted to renew this motion in the Federal Court. So this case comes clearly within the decision in the Allmark case and that case is controlling. The Court below was not warranted in ignoring all precedent and authority and deciding the question *de novo*. No distinction can be made upon the ground that in the decision of this case the State Court did not pass upon all the facts presented by the moving affidavits just the same as the Court below passed upon them. The State Court simply came to a different conclusion as to the legality of the service of the summons upon the Secretary of State than did the Court below. How then can the decision of the Court below be sustained and it be said that the determination of the State Court is not *res adjudicata* upon the very question as to which the defendant in error submitted itself to the jurisdiction of the State Court?

It is only by main strength, by disregarding the principle of law as laid down by the cases and the rules of comity as recognized by all Courts that this distinction can be made and the rule of *res adjudicata* ignored.

Section 21 U. S. R. S.
Sipe v. Cokwell, 59 Fed. Rep. 970.
Phoenix Ins. Co. v. Parsons, 129 N. Y. 87.
Woodhouse v. Duncan, 106 N. Y. 527.
Tusco v. O'Brien, 68 N. Y. 446.

The court below to sustain its position (148) relies upon a long line of decisions of the Federal Courts with which we do not take issue, and which in brief hold that service upon an officer of a foreign corporation which is not engaged in

the business within the State of New York is not legal, although such service is legal under the statutes and decisions of the State Court. Of these decisions we especially wish to distinguish

*Remington v. Central Pacific Railroad Company,* 198 U. S., 95.

This case will be urged as an authority decisive of this appeal, and sustaining the contention of the defendant in error. But a careful reading of the facts of the case enable it to be clearly distinguished.

The action was brought in the Supreme Court of the State of New York April 10th, 1903, by serving the summons on a director of the defendant. April 20th, plaintiff's attorneys gave twenty days additional time to defendant in which to appear generally or specially or to move to vacate the summons. May 11, a firm of lawyers gave notice of a motion to set aside the service and also that they appeared only for that purpose. An agreement was made giving the defendant time to appear after the motion was decided. The motion was not decided until September 28, 1903, when it was denied and an order to that effect was entered October 2nd. Defendant's attorney filed notice of appeal October 15th and the next day gave notice of a motion to stay proceedings on the order to be made October 24th. On the same day, October 16th, the plaintiff made an affidavit in which it appeared that the sum which he sought to recover was more than $2000. This contained the first definite notice to defendant that the cause was removable as no declaration had been filed. An order to take plaintiff's deposition and this affidavit were served on the defendant October 23rd. On October 26th, a petition for removal to the United States Circuit Court was presented by the defendant and the cause removed. Before the removal, the motion for a stay came up on October 24th in the State Court, and a stay was ordered, the defendant at the same time being relieved from any default in appearing. The matter of the appeal was not passed upon. In the Circuit Court the defendant obtained leave and renewed its motion to set aside the service of the summons, the plaintiff objecting on various grounds and moving to remand the case. July 23, 1904, the court granted defendant's motion and overruled plaintiff's motion and the cause was dismissed for want of jurisdiction of the defendant. Judge Holmes in his opinion at page 99 says:

> "It is said that the decision of the State Court, although appealed from, was *res adjudicata.* But it stood no higher than a similar decision made by the Circuit Court. It may be that the defendant would

have had no right to renew its motion, but the Circuit Court would have had power to give it leave. If the Circuit Court was satisfied that it or its predecessor, the State Court, had made a mistake, it had power to re-open the matter. It did so and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice not want of jurisdiction that makes the rule."

The facts as well as the practice in that case materially differ from the case at bar. There the decision of the State Court refusing to set aside the service of the summons upon the defendant had not been determined by a court higher in authority than the Federal Court. An appeal had been taken but it had not been argued and had not been decided by the highest court of the state capable of passing upon that question, as was done in the case at bar. Judge Holmes expressly recognizes as do all the decisions recognize that it is only the determination of the highest tribunal in the State that is binding and controlling upon the Federal Courts.

Furthermore the practice in this Remington case was different from the practice in the case at bar. As soon as the Remington case was removed to the Federal Court, the defendant, with the adverse decision of the State Court against it, immediately moved in the Federal Court for leave to renew the motion which the State Court had decided adversely to it. That leave was granted and then the motion to set aside the service was considered and decided in favor of the defendant. Here the defendant in error adopted no such procedure but after being defeated in the State Court and the decision of the State Court being affirmed by the highest tribunal in the state, defendant in error removes the case to the Federal Court and, without asking leave, brings up the quesion *de novo* upon precisely the same moving papers as he was defeated upon in the State Court, and succeeds under these facts on his motion.

The Remington case cannot be considered as controlling or an authority to sustain the decision of the court below, as there the question of *res adjudicata* could not be raised since the decision of the State Court was no higher than the decision of the Federal Court. The defendant there relieved itself of the embarrassment of that adverse decision by obtaining leave of the Circuit Court to renew its motion, which had the effect of raising the question with the same force and effect as it was originally raised and considered in the State Court.

Johnson v. Computing Scale Co., 139 Fed. Rep., 339, is another case relied upon by the court below, but a reading of the facts in that case does not even bring it within the vision of this case, and a brief statement of those facts shows that there is no necessity for distinguishing it. There the defendant was a foreign corporation, owning no property, having no place of business or transacting any business within the State of New York. An officer of the company while temporarily within the state was served with process. After service of the summons, the defendant specially appearing obtained an order requiring plaintiff to show cause before a justice of the State Court why such service of the summons should not be set aside. Not waiting to make that motion and before the return of it, or any decision upon that motion, the case was removed by petitioner to the Federal Court where the motion to set aside the service was made and granted. All that the Circuit Court decided was that the defendant appearing specially in the State Court and moving to set aside the service of the summons, did not submit itself to the jurisdiction of the State Court and the facts showed that the case fell within the numerous decisions of the Federal Courts that the State Court did not have jurisdiction of the defendant corporation by service of process upon an officer when temporarily within the state. The question as to the motion in the State Court being *res adjudicata* upon the proceedings of the Federal Court was not raised or considered by the Circuit Judge.

The facts presented here by the moving papers, together with the decision of the highest tribunal of the State, stand as a bar to the defendant raising in the court below the same questions of fact upon the identical papers passed upon by the State Court, which determined adversely to the defendant every question raised. The proceedings in the State Court are, therefore, *res adjudicata.*

## POINT III.

**The other assignments of error are absolutely dependent upon these discussed above.**

## POINT IV.

**The order of the Circuit Court should be reversed upon the ground that the State Court obtained jurisdiction by the service of the summons as made and that consequently the Circuit Court of the United States in its turn obtained jurisdiction.**

CLARENCE M. BUSHNELL,
*Attorney for Plaintiff in Error,*
917 Chamber of Commerce,
Buffalo, N. Y.

Office Supreme Court, U. S.
FILED.
OCT 19 1909
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 2.

LATHROP, SHEA & HENWOOD COMPANY,
*Plaintiff in Error,*

*vs.*

INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

# BRIEF FOR DEFENDANT IN ERROR.

C. WALTER ARTZ,
*Of Counsel.*

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

# Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 2.

LATHROP, SHEA & HENWOOD COMPANY,
Plaintiff in error,

AGAINST

INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

## BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Western District of New York, upon certificate raising the question of the jurisdiction of that Court as a Federal Court, and is prosecuted to review an order thereof entered on February 5th, 1907, setting aside the service of summons on the defendant in error (defendant below), vacating a default judgment against said defendant, entered upon such service and dismissing the action for want of jurisdiction of the defendant.

Writ of Error, Record, p. 95.
Order setting aside service, etc., Record, 384.
Certificate of Circuit Court, Record, 392.

The action was originally entitled, in the Supreme Court of New York, County of Erie, against the Interior Construction and Improvement Company (hereinafter called the Construction Company), a corporation of the State of New Jersey,

and the Pittsburg, Shawmut and Northern Railroad Company, a consolidated corporation of the States of New York and Pennsylvania. Its object was the recovery of money for services performed and materials furnished under contract with the Construction Company in connection with the construction of the Railroad Company's line of railroad.

Complaint, Record, pp. 8–16.

To account for the presence of the Railroad Company as a defendant, it is alleged in the complaint, among other things, that "the said construction company was but the agent or representative of the said railroad company, which was and is responsible and liable for all of the acts and obligations of the said construction company in the construction of said railroad."

Complaint, Par. III., Record, p. 9.

Plaintiff sought to make service of the summons and complaint upon the Construction Company by delivering copies thereof to the Secretary of State of New York on November 16th, 1904, claiming the right to acquire jurisdiction over the defendant Construction Company in that manner under section 16, of the General Corporation Law of the State of New York.

No general appearance or answer has been served in the case on behalf of the Construction Company, but proceedings were had by it both in the State Court and subsequently in the Federal Court to which the cause had been removed, looking to the quashing of the service on the Secretary of State for want of jurisdiction of the defendant Construction Company.

These proceedings may be briefly outlined as follows:

## Proceedings in the State Court prior to the First Removal.

Application was made to the Supreme Court of the State of New York, at a Special Term of that Court in the County of Erie, on December 6th, 1904, upon the return of an order to show cause, the Construction Company appearing by attorney specially for purposes of motion only, to set aside the service of summons upon the Secretary of State, upon the grounds as stated in the order to show cause that be-

fore the service was made the Company had ceased "doing business in the State and had removed its office therefrom; that its designated agent for the acceptance of service of process in this State, one Frederick H. Mollenhauer had duly revoked his consent and no new designation had been made; and that the "conditions under which service may be made upon the Secretary of State provided for by Section 16 of the General Corporation Law as amended by Chapter 490 of the Laws of 1904, to wit: the death or removal of the person designated, from the place where the corporation has its principal place of business within the state do not exist in this case."

Order to Show Cause in State Court, Record, pp. 62-63.

That motion was denied without opinion, and the order so entered was affirmed by the Appellate Division of the State Supreme Court without opinion and a consequent application for leave to appeal to the Court of Appeals was denied. During all this period the time of the Construction Company to appear and plead had been kept open, extensions to that effect having been granted by order and stipulation, so that the Construction Company would not have been in default, under such orders and stipulations, until ten days after service of the order of the Appellate Division denying leave to appeal to the Court of Appeals as stated. Under these circumstances the cause was removed from the said Court of February 6, 1905, on the petition of the Construction Company upon the ground of the existence of a separable controversy as to that defendant.

See Certificate of Circuit Court, Record, p. 93.

## Proceedings in the Circuit Court on First Removal.

On this removal an order was obtained from the Circuit Court directing the plaintiff to show cause why the service of summons as upon the defendant Construction Company should not be set aside.

Order to Show Cause, Record, page 34.

On the return of the order a motion was also made by the plaintiff to remand the cause on the ground that no separable controversy was involved.

Certificate of Circuit Court, page 93.

Both motions were argued at the same time and the Circuit Court, by order entered March 17th, 1905, granted the motion to remand the cause, having held in its opinion (Reported 135 Fed., 619) that no separable controversy existed. At the end of the opinion the Court stated (135 Fed., 621):

> "The motion to dismiss the substituted service of process heard at the same time is denied. So ordered."

This denial was, of course, formal, because the Court having come to the conclusion that the removal was not proper could not go further and pass upon the validity of the service.

## Proceedings in the State Court between First Remand and Second Removal.

The Construction Company then moved in the State Court on the return of an order to show cause on March 31st, 1905, for further extension of time to appear in answer until twenty days after the termination of a pending motion made by the Pittsburgh, Shawmut and Northern Railroad Company to compel the plaintiff to elect which defendant it would proceed against in the action to the exclusion of the other.

Certificate of Circuit Court, Record, pp. 93, 94.

The motion of the defendant Construction Company was denied, as was also the motion to compel an election made by the Railroad Company. The defendant Construction Company took no further action pending the trial of the issues raised by the Railroad Company, which issues had been referred to Honorable CHARLES B. WHEELER, of Buffalo, to hear and determine.

Certificate of Circuit Court, Record, p. 94.

The stenographer's minutes of the trial before the referee show that counsel for the plaintiff first admitted in his opening

statement that sooner or later he would be obliged to elect whether to proceed against the Railroad Company or the Construction Company but claimed that the Construction Company was then in default.

See Stenographer's Minutes, Affidavit of C. Walter Artz, Record, p. 46.

No further proceedings were taken against the Construction Company until September 27th, 1905, when judgment as upon default was entered in the State Court against it for the sum of $47,363.15.

See Judgment; Record, p. 32.

Subsequently and on October 25th, 1905, judgment was entered by the State Court upon the report of the referee, dismissing the complaint of the plaintiff as to the defendant Railroad Company.

Judgment; Record, p. 33.

Thereupon this cause was again removed into the Circuit Court for the second time.

## Proceedings in the Circuit Court on Second Removal.

The motion to set aside service was renewed upon the return of an order to show cause granted by the Circuit Court. Concurrently with that motion, a further motion to remand was made by the plaintiff. Both motions were argued on November 9th, 1905. The theory of this second removal was that the Circuit Court having ruled on the first motion to remand that no separable controversy as to the Construction Company existed, the dismissal of the action as to the Railroad Company left the Construction Company the only defendant, and that the case then, for the first time became a removable one. The Circuit Court again remanded the case to the State Court, upon the ground that it appeared that the plaintiff had appealed from the judgment, dismissing its complaint as to the Railroad Company, which appeal was then pending in the Appellate Division of the State Supreme Court, and there had not been

a final determination of the controversy as to the Railroad Company. The opinion of the Court is reported in 143 Fed., 687.

In concluding its opinion the Circuit Court said :

> "It is unnecessary to pass upon the validity of the substituted service of process upon the defendant Construction Company.
>
> "The motion to remand is granted, and the motion to at this time quash the service of process is denied. So ordered."

On February 2nd, 1906, an order was entered remanding the case to the State Court, and at the same time a further order was made denying in form the motion to set aside service.

## Proceedings in the State Court between Second Remand and Third Removal.

On December 4th, 1906, the Appellate Division affirmed the judgment of dismissal as against the Railroad Company, and thereupon, no further appeal intervening, the Construction Company again removed the case to the Circuit Court.

Certificate of Circuit Court; Record, p. 94.

## Proceedings in the Circuit Court since Third Removal.

On the perfection of this removal the Construction Company on December 4th, 1906, obtained an order from the Circuit Court directing plaintiff to show cause on the return thereof, why the service of Summons upon the Secretary of State should not be set aside, and the judgment rendered thereon vacated. This motion was granted, and the order now under review entered on February 5th, 1907.

See Order; Record, p. 84.

The merits of the application to set aside the service upon the Secretary of State were therefore determined by the Circuit Court on the present motion for the first time.

Before discussing the questions of law involved in this determination it may be of some service to the Court to state in

a general way the facts in proof appearing in the affidavits already submitted on the former motions and the affidavits on the appeal to the Appellate Division from the order denying the motion made in the State Court to set aside service.

The Construction Company is a foreign corporation organized and existing under and by virtue of the Laws of New Jersey.

Affidavit of F. H. Mollenhauer, Record, p. 35.
Affidavit of Edward Donnelly, Record, p. 42.
Affidavit of Henry S. Hastings, Record, pp. 38, 39.

In the month of August, 1904, it ceased doing business in this State, removed its office therefrom and has ever since done business and maintained such office in the City of Detroit, Michigan.

Affidavit of F. H. Mollenhauer, Record, p. 35.
Affidavit of F. H. Ridgway, Record, pp. 40, 41.
Affidavit of Edward Donnelly, Record, p. 42.
Affidavit of Henry S. Hastings, Record, p. 39.
Affidavit of Alexander Munro, Record, pp. 41, 42.

Mr. Mollenhauer, who at the time and for more than seven years before the service on the Secretary of State was made, resided and had an office in New York City, who had been the designated person upon whom process could be served in this State, upon the Construction Company during the continuance of its business herein, and who formally revoked his consent to such designation by instrument dated November 10, 1904, and filed in the office of the Secretary of State, November 14, 1904, in the State Court, Record, p. 63, states:

> "FOURTH: That before said 10th day of November, 1904, the said corporation The Interior Construction and Improvement Company, ceased to do business within the State of New York, and removed and has not since such removal and cessation to do business, maintained any office or place of business within this State, but has maintained and maintains now such office and place of business in the City of Detroit, State of Michigan, and has ever since done business in said City and State."

Frederick H. Ridgway (see his Affidavit, Record, pp. 40–41), who had been the private secretary of John Byrne, the Chair-

man of the Board of Directors of the Pittsburg, Shawmut and Northern Railroad Company, for some time, states that on the 3d day of August, 1904, the Construction Company, which, up to that time, had an office in the suite occupied by John Byrne, moved its office therefrom to Detroit, Michigan; that there is in the public hall in the building a public directory or bulletin, upon which the names of the tenants are painted in large letters, and there is also in the public hall a small pasteboard card, with printed names, showing the tenants of the building; that the pasteboard card is in a frame behind glass, and inaccessible to any one except those having charge thereof; that the tenants in the building have the right, at their own expense, to have printed upon the large bulletin board in the hall such names as they desire, and make corresponding erasures; that the Construction Company's name has not been upon the large painted directory for a period of several years, and was not upon the door of the suite of offices occupied by John Byrne at the time of the service of the summons upon the Secretary of State, nor since the third day of August, 1904, when the Construction Company ceased to do business within this State; that many times before the service of the summons herein upon the Secretary of State, Mr. Ridgway gave positive directions to the persons in charge of the building, and the pasteboard card above mentioned to have the name of the Construction Company removed therefrom, but the parties having charge have wholly failed and neglected to remove the same; that it has been their practice in many cases to neglect this pasteboard card, and the names of the tenants who had gone from the building for several years have continued to appear on the card; that as private secretary to John Byrne he knows that the Construction Company upon the 3d day of August, 1904, removed its office from No. 45 Wall Street and from correspondence in his possession he believes that such office was removed to Detroit, Michigan, is at present located at that place and that since that date the Construction Company has had no other place of business in this State.

It further appears in Mr. Ridgway's affidavit that the Railroad Company and Mr. Byrne have permitted the contract for telephone service to remain in the name of the Construction

Company because that contract, which was made some years ago, had very favorable terms and it has not been deemed good business policy for the Railroad Company or Mr. Byrne who paid for the service to disturb it. So far as additional wires and instruments and the insertion of names in the telephone book are concerned, the Railroad Company is a party to the contract.

Edward Donnelly, a resident of the City of Detroit and the President of the Construction Company, since August 4th, 1904, states (See his Affidavit, Record, p. 42) that he is familiar with the business and affairs of the said Company and that it has not done any business in the State of New York or owned any property therein since August 4th, 1904.

Alexander Munro, the Secretary of the Construction Company, states (See his Affidavit, Record, pp. 41–42) that he attended the meeting of the Board of Directors at the City of Detroit on August 4th, 1904, at which the following resolution was passed:

> "Director Munro moved that the branch office of the Company, heretofore located at Number 45 Wall Street, in the City of New York, be moved from said place to Number 33 Peninsular Savings Bank Building, in the City of Detroit, Michigan, which motion being duly supported by Director Armstrong, was put to vote by the chair and unanimously carried."

Henry S. Hastings, until December 28th, 1904, the General Agent of the Construction Company, employed at St. Marys, Pa., after reciting the organization of the Construction Company and the various enterprises with which it has been connected, including the construction of the Pittsburg, Shawmut and Northern Railroad, deposes (See his Affidavit, Record, pp. 38, 39) that the work of construction of said railroad was practically completed in the summer of 1904 and all the work in which the Construction Company was engaged on the first day of July, 1904, surrendered to the Railroad Company:

> "That on the third day of August, 1904, the said Construction Company ceased absolutely to do or carry on any business within the State of New York; that on or prior to said date, it sold all its plant, machinery and other equipment located within the State of New York

> used in the construction of the said railroad; that the said Interior Construction and Improvement Company has not at any time since the third day of August, 1904, transacted or engaged in any business, either with the Pittsburg, Shawmut, & Northern Railroad Company, or with any other person, firm or corporation, within the State of New York"—that the Construction Company has an office at Passaic, New Jersey, and a general office at Detroit, Michigan; that certain residents of Detroit are its President, Secretary and Treasurer; that deponent was its General Agent and that it has no office or officers within the State of New York."

It appears then, under these affidavits that the office of the Construction Company, was in fact removed from 45 Wall Street, New York City to Detroit, Michigan, on the 3rd day of August, 1904, that corporate action authorizing and directing the removal of the office was had in Detroit at a meeting of the Board of Directors on the succeeding day and that since that time, the Company has not done any business or owned any property in the State of New York.

Since the argument of the first motion to remand, counsel for plaintiff, Hon. J. H. Metcalf, has intimated that he might make some contention against the admission made at that time that the Construction Company had ceased doing business in New York, and on the argument of the motion resulting in the order under review emphasized his claim that his affidavit of November 16, 1905 (Rec., p. 60) filed on the second motion to set aside service in the Circuit Court in which he states that a suit was instituted before the service in this action in the Supreme Court of the State of New York against Winfield McLane and another, and claims that the pendency of such suit constitutes the doing of business. As we shall show hereafter, this claim is absolutely without legal foundation.

Section 16 of the General Corporation Law of the State of New York provides as follows:

> "PROOF TO BE FILED BEFORE GRANTING CERTIFICATE.—Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the

corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State, which is to be its principal place of business, and designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the State.

If the person so designated dies, or removes from the place where the corporation *has its principal place of business within the State*, and the corporation does not within thirty days after such death or removal, designate in a like manner another person upon whom process against it may be served within the State, the Secretary of State may revoke the authority of the corporation to do business within the State, and process against the corporation in an action upon any liability incurred within this State before such revocation may, after such death or removal and before another designation is made, be served upon the Secretary of State. At the time of such service the plaintiff shall pay to the Secretary of State two dollars, to be included in his taxable costs and disbursements, and the Secretary of State shall forthwith mail a copy of such notice to such corporation, if its address or the address of any officer thereof is known to him."

This section is preceded by Section 15, providing that :

"No foreign stock corporation other than a moneyed corporation shall do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of the law to authorize it to do business in this State," etc.

Section 16 contemplates two general contingencies to authorize service upon the Secretary of State:

1. The death of the agent or his removal from a given "place"; involving the definition of a word in a case where the agent remains in the city or village where the corporation has its principal place of business within the State, but changes the address of his office or residence.

2. That such principal place of business in this State survive the death or removal of the agent and exist at the time of the service upon the Secretary of State.

This appears on the face of the statute by the use of the

present tense "has", instead of the past, "had", before the words "its principal place of business within the State."

It was argued in the State Court that the Construction Company having before the time of service of the summons upon the Secretary of State, removed its office from this State and ceased doing business therein or holding property therein and the designation of its agent, Mr. Mollenhauer, having been revoked by the filing of the revocation of his consent as provided for in sub-division 2 of Section 432 of the Code of Civil Procedure, jurisdiction over the Company could not be acquired under Section 16 of the General Corporation Law, by service upon the Secretary of State; and it was further insisted that the agent had not removed his office in the way contemplated by the statute, inasmuch as said removal had been within the City of New York, which it was submitted was a proper definition of the word "place" as used in Section 16 of the General Corporation Law.

In denying the motion and in affirming that denial, the State Court did not, either at Special Term or in the Appellate Division, file any opinion indicating the grounds upon which its decision was based, although if it had held in favor of the Construction Company on either of the propositions advanced by it, the service must have been set aside. Assuming its construction of the statute in favor of the plaintiff (and so far as mere construction goes, the Federal Court assuredly will follow the State Court in common law cases under Section 34 of the Judiciary Act of 1789, U. S. R. S., Section 721), such a ruling, as we shall endeavor to show, in nowise affects the proposition that under the circumstances of this case, and independent of the statute or the construction thereof, the fact that the Company had ceased doing business in this State, had removed its office therefrom, and held no property therein, and that its agent had revoked the consent to his designation prior to the time of the service of summons, prevented the jurisdiction of the State Court from attaching, and that no judgment can be rendered against the Construction Company in an action based upon such service which would be entitled to the slightest recognition in the Federal Court or any courts of sister states.

On the motion to set aside service made in the Circuit

Court as stated in *Remington vs. C. P. R. R. Co.*, 198 U. S., 95 (99) " the jurisdiction of the Circuit Court as a federal court " was in question. Obviously this question has not been and could not be raised in the State Court.

## The Decision of the Circuit Court.

Adopting this view the Circuit Court held on the facts appearing that the following issues were presented.

See Certificate, Record, p. 95.

> " I. Whether this Court had obtained jurisdiction over this defendant by the service of a summons upon the Secretary of State of the State of New York, as provided by Section 16 of the General Corporations Law of said State of New York.
>
> " II. Whether the proceedings in and the decisions of the Courts of the State of New York construing said Corporations Law, were controlling upon this [the Circuit] Court.
>
> " III. Whether the proceedings taken by said defendant in said State Court are *res adjudicata* upon defendant."

Each of these issues was decided in favor of the defendant.

Before proceeding to the consideration of the matters argued before the Circuit Court, it seems proper to suggest to this Court that counsel is in error in charging that effort is being made to evoke a technicality to avoid an admitted liability, stating that the liability evidenced by his judgment is admitted. (See Brief for Plaintiff in Error, p. 7.) Upon the other hand, such liability has been most strenuously denied, and upon a trial had in New Jersey between the parties to this writ of error, and since the order now under review was made, upon which trial a thorough investigation of the claim of the Lathrop, Shea & Henwood Co. was made by a Master in Chancery, numerous witnesses being examined before him, the Company named recovered judgment against the Interior Construction & Improvement Co., for the sum of $13,-647.56, with interest from December 19th, 1903, or about one-third of the face of the default judgment which the plaintiff in error now seeks to uphold.

Clearly, and to quote counsel "in all fairness," the plaintiff in error cannot consistently claim that even if the default judgment were based upon proper service it should legally have been rendered for a greater amount than the recovery after a full trial in New Jersey. Counsel however, still insists upon his effort in this Court to reinstate the default judgment as entered.

We think that the Circuit Court properly disposed of the issues presented and committed no error in vacating the default judgment rendered in the State Court and setting aside the service of summons; and in support of our position we submit the following

## ARGUMENT.

### I.

**This removal was regular, having been made with due diligence as soon as the case became by the affirmance of the dismissal as to the Railroad Company a removable cause under the decision of the Circuit Court on the former motion to remand; and the mere entry of judgment by default in no wise affected the right to remove.**

This proposition was necessarily and we think properly affirmed by the Circuit Court in proceeding to decide the motion terminating in the order under review.

The plaintiff seeking as stated in his counsel's opening statement to the Referee (Record, p. 46) to hold the Railroad Company liable instead of the Construction Company, carefully refrained until the 27th day of September, 1905, from entering judgment against the Construction Company. Until such judgment should be entered and the election of the plaintiff to hold the Construction Company liable instead of the Railroad manifested, the Railroad Company remained a

very substantial party in interest and in view of the Circuit Court's decision that no separable controversy existed, no removal could be had.

Upon the entry of such judgment, however, the Railroad Company promptly applied for a dismissal, which although made upon grounds involving the merits, resulted in a judgment of the State Court to the effect that there was no liability on the part of the Railroad Company, and that therefore the complaint could be dismissed as to it. The Railroad Company was therefore, unless hereafter ordered to be brought into the litigation, no longer a party nor had it any interest in the subject matter of this suit, which from that time existed only between the plaintiff and the Construction Company. As soon as this situation appeared, it became necessary under the decisions of this Court that the Construction Company act with promptness in removing the case; and the right to remove it at that time was, we think, clear.

Powers vs. C. & O. Ry. Co., 169 U. S., 92.
Ry. Co. vs. Herman, 187 U. S., 63.

These cases have been reaffirmed by the Supreme Court in the case of Remington vs. Ry. Co., 198 U. S., 95, where, by reason of the failure to file an affidavit showing that more than $2,000 was involved in the litigation, until after the case had been pending some months, removability was not at once apparent.

In Powers vs. Chesapeake and Ohio Ry. Co., 169 U. S., 92, the action had been brought in the State Court against the Railway Company and certain individuals of the same residence as the plaintiff joined as defendants. The Railway Company removed upon the ground of separable controversy, but a motion to remand was granted, and the cause went back to the State Court for trial. An answer containing a demurrer was interposed by the Railway Company and a year after the first petition for removal, when the case was called for trial before a jury in the State Court, the plaintiff discontinued his action against the individual defendants. The Court overruled the demurrer and the Railway Company filed a second petition for removal, stating that because of the improper joinder of the individual defendants the case had been remanded to the State Court and that the

action having now been discontinued as against them, was for the first time pending against the Railway Company alone. The State Court denied the petition for removal and the Railway Company excepted to the denial. *It is highly significant that thereupon the trial proceeded in the State Court resulting in a verdict and judgment for the plaintiff and the Railway Company appealed to the Court of Appeals of the State.*

The transcript of the record was not filed in the Circuit Court of the United States until the succeeding term and notwithstanding the pendency of the appeal in the State Court, and although the plaintiff pleaded in abatement of the cause in the Circuit Court of the United States and to the jurisdiction of that court *the proceedings in the State Court in which the Railway Company took part after the denial of its second petition for removal and its appeal to the Court of Appeals of the State, and for the same reasons moved the court to defer all proceedings until the determination of the case in the courts of the State and in the Federal Court if the case should be brought there from the State Court subsequently, and also moved to remand the cause to the State Court, the Circuit Court of the United States sustained the demurrer to the plea and denied the motions to defer and to remand. The case was afterwards called for trial in the Circuit Court and dismissed upon the ground that the original petition of the plaintiff did not state a cause of action.*

This Court affirmed the judgment appealed from, Mr. Justice GRAY, stating among other things:

> "But the time of filing a petition for removal is not essential to the jurisdiction. The provision on that subject is in the words of Mr. Justice BRADLEY, 'but modal and formal,' and a failure to comply with it may be the subject of waiver and estoppel."
>
> Citing cases.

also Fritzlen v Boatmens Bank 212 U.S. 364.

This case should be distinguished from those like Whitcomb vs. Smithson, 175 U. S., 635, referred to in Kansas City, &c., Company vs. Herman, 187 U. S., 63, where, as stated by this Court the joint liability was insisted on to the close of the trial, and under those circumstances the non-liability of one of the defendants was ruled *in invitum*. Whatever value cases of that class might have in this case, in the event that

plaintiffs, " to the close of the trial " before the Referee had insisted upon the joint liability of the defendants and the decision dismissing the complaint as to the Railroad Company had been in direct opposition to such a contention, is lost to theplaintiff here, from the fact as shown in the excerpts from counsel's opening statement, defining his position, that no claim whatever was made that there was a joint liability of the defendants, and that question could not therefore, be involved in the decision. Counsel admitted that the liability was several, and that he sought to hold the Railroad Company ; and manifestly as long as he thought he could recover of the Railroad Company, he forebore to enter up judgment on the claimed default against the Construction Company He did not want to exercise his election to hold the Construction Company so long as he thought his recovery against the Railroad Company might be had and might be liquidated. Until he entered up judgment against the Construction Company, he could proceed against the Railroad Company, but after the entry of that judgment clearly on his own express statement, that an election would have to be had, he could not have judgment against the railroad company.

It matters not that he failed to prove the case alleged against the Railroad Company, *the fact remains that he claimed only to hold one defendant ;* he entered up judgment against that defendant, and in consequence the other defendant has been dismissed from the cause.

The mere entry of judgment against the Construction Company in an action like this, where there has been no appearance, in no wise prevents the removal of the cause and the motion to set aside service.

This is clearly established in the case of Cady vs. Associated Colonies, 119 Fed., 420, where service had been sought to be made in a suit against a corporation in the State of California, upon the Secretary of State of California and default judgment had been rendered. The case was removed after the default judgment and while a motion was pending in the State Court to vacate that judgment. That motion, of course, proceeded no further after the removal. The Circuit Court of the United States for the Northern District of California entertained and granted a motion vacating the judgment and quash-

ing the service of summons, a very clear opinion being rendered by Circuit Judge MORROW.

See, also, to same effect:

Tortat vs. Hardin, &c., Co., 111 Fed., 426.

## II.

### The pendency of the suit against McLane and another on the part of the Construction Company as plaintiff does not constitute doing business under the Corporation Law of New York.

In the discussion of the merits of the motion as argued before the Circuit Court it is proper to determine at the outset whether the prosecution of the suit by the Construction Company against McLane and another in the State Court of New York constituted "doing business" in that State; inasmuch as that prosecution is the only transaction of any kind which the papers show that the Construction Company conducted at and since the time service was made in this action on the Secretary of State.

In its opinion (Record, p. 83) the Circuit Court says:

> "It is conceded by the plaintiff that the maintenance of the action in the State Court by the defendant is not of itself doing business within the State."

Notwithstanding this, counsel for plaintiff in error now argues substantially to the contrary (see his brief, p. 15).

We think that the concession made as stated by the Circuit Court should still hold, but in case that this Court should deem it proper to consider this question as open to argument here we shall briefly outline our views upon it.

Common sense shows that the conducting of business and the enforcement by suit of rights growing out of the conduct of such business are two entirely separate and distinct things. After declaring the necessity of a certificate as pre-requisite

to " doing business in this State," it is expressly and by contrast provided in Section 15 of the General Corporation Law that " no foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State unless prior to the making of such contract it should have procured such certificate." It appears, therefore, that the prohibition against bringing suit applies only to contracts made " in this State," by a corporation " doing business in this State." It does not appear in the affidavit of J. H. Metcalf, verified November 16, 1905 (Record, p. 60), nor the affidavit of Clarence M. Bushnell, to which it refers, that the contract sued upon in the McLane action was made, or that the construction of that portion of the Pittsburg, Shawmut and Northern Railroad to which it referred was located within the State of New York. But independent of this, it is clear that under the adjudications in the courts of that State the transaction of business as ordinarily understood and not the institution of actions to enforce liabilities growing out of such business is the doing of business contemplated by the Statute.

In Tallapoosa Lumber Company vs. Halbert, 5 App. Div., 559, an action was brought upon a promissory note by an Alabama corporation, which had not obtained from the Secretary of State of New York a certificate that it had complied with all the requirements of law to authorize it to do business in that State.

The note in question was made, was payable and was delivered in the State of New York to a traveling agent of the plaintiff, who took orders for the purchase of plaintiff's merchandise, which were subject to approval by the home office of the plaintiff in Alabama, and did not become effectual until the sales were approved there. It was held, that as the plaintiff had no office or place of business in New York, the mere fact that its agent took orders here which did not become binding until they were approved by the corporation in the foreign state, could not be said to place the corporation in the position of " doing business in this State " within the meaning and prohibition of the Statute, and the judgment on the direction of a verdict for plaintiff was sustained.

It is obvious that if the institution and prosecution of the

suit had been "doing business within this State," no certificate having been obtained, no judgment for the plaintiff could have resulted.

See, also, Christian vs. Mtge. Co., 89 Ala., 198, where it is directly held that the institution and prosecution of suits is not "doing business" within the meaning of statutes of this kind.

This is, of course, merely an application of the rule prevailing generally.

The Court of Appeals of the State of New York in a very recent case, Penn. Collieries Co. vs. McKeever, 183 N. Y., p. 103, has defined what constitutes "doing business" as used in the statute under consideration. The Court says:

> "To be 'doing business in this state' implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here with the maintenance of an office for the transaction of its business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on a business."

In a subsequent case in the same court (Hunter vs. Mutual Reserve Life Insurance Co., 184 N. Y., 136) it was urged that the corporation had continued to do business in the State after the revocation of its power of attorney. The transactions on which such claim was based were four—

> "three of which involved the settlement of losses under or readjustment of policies issued to residents of North Carolina while the defendant was regularly transacting business there, and in the fourth case a special adjuster, appointed to settle the claim with a supposed resident of Washington, followed him for such purpose into the state of North Carolina, whither he removed" (page 141).

The Court, in its opinion ( p. 143), says:

> "The specific acts which are detailed in the submission arose in connection with the settlement and treatment of old liabilities and old business. We do not think there was any such continuation of an ordinary substantial and active insurance business as would be necessary to keep alive the power of attorney within the plaintiff's contention upon this point."

The question was also considered in the case of Cady vs. The Association of Colonies, 119 Fed. Rep., 420, where the court said:

> "The evidence introduced in this case in support of the motion under consideration shows conclusively that the defendant had not been doing business in this state more than two years when service of process was made on the Secretary of State. The fact that there was some claim against the defendant remaining from its former business in the state is not sufficient. It must be engaged in transacting some substantial part of its ordinary business."

## III.

### The order of the state court is not res judicata on this application, and the Circuit Court was in no wise precluded from the determination of the question of jurisdiction.

As we have indicated, the application in the State Court related only to the construction of the statute under which service was made (See papers before Appellate Division, Record, pp. 62-79). There was no disputed question of fact determined by the State Court on the motion there made to set aside the service. There was no dispute that Mollenhauer on April 1st, 1899, was duly designated as a person upon whom process might be served and that subsequently and on November 14th, 1904, the designation was duly revoked. There was no dispute that the company had ceased to do business in the state long before the attempted service upon the Secretary of State, and the only pretence made upon this argument to the contrary is that at the time of the service and for about a year prior thereto there was pending in the courts of this state an action instituted by the Interior Construction Company and we think that we have established, in Point II. of this brief, that the mere pendency of such an action is not doing busi-

ness within the State. The State Court naturally did not assume to pass upon its jurisdiction to render a judgment viewed from the standpoint of the effectiveness of that adjudication as a personal judgment in the courts of sister states or in the Federal Courts. All that it did was to decide that the conditions pre-requisite to the authorization of service upon the Secretary of State *under the terms of Section 16 of the General Corporation Law* of New York had been fulfilled, notwithstanding the fact appearing in the papers before it, and admitted on the oral argument on the first application in the Circuit Court that the Construction Company had ceased doing business in the State, had no property therein, had removed its office, and the further fact that the agent had filed a revocation of his consent under Section 432, Subdivision 2 of the Code of Civil Procedure before the state official was served. Counsel for the plaintiff in error, however, asserts generally that the motion to vacate service made on special appearance in the State Court bars any motion to set aside service subsequently made in the Federal Court, and cites cases which he claims support his contention. An examination of those cases, however, we submit, leads to a very different conclusion.

Special stress is laid upon the case of Allmark vs. Platte S. S. Co., 76 Fed., 615.

The report of that case does not show the facts but refers to the cases of Brooks vs. Farwell, 4 Fed., 166, and Loomis vs. Carrington, 18 Fed., 97, in support of the adjudication; and even there Judge BENEDICT does not pretend to hold that a motion involving the same propositions might not be raised in the Federal Court provided leave to that effect had been obtained in either the State or Federal Court.

Since the argument of the first motion to remand, counsel have examined the record in the Allmark case, both in the State Court and in the Federal Court in Brooklyn. Allmark sued the Steamship Company for damages for an injury suffered by him while as a longshoreman he was engaged in removing freight from the steamship "Ocampo" at Pierrepont stores, Brooklyn. Service was made upon one John Johnson as the managing agent of the steamship Company. The application in the State Court was based upon allegations that Johnson was not at the time a representative of the steamship

Company. His moving affidavit, verified June 2, 1896, on the application in the State Court, says:

> "That at the time of the service of the summons and complaint herein, I was not an officer, director or employee or agent of the defendant, nor have I ever been. That I have never been and am not authorized, and have no power to, and did not and do not, represent the defendant in any manner and am not and have not been engaged in any business for the defendant and had and have no connection or relation with it whatever. That I am and have been for a number of years in the employ of the Mogul Steamship Company, which is an English corporation, entirely distinct and separate from the defendant, and having no business connections or relations, or connections or relations of any kind, with the defendant or any of its steamships or property."

Johnson further stated that he came into this country from England on business for the Mogul Company.

The Ocampo was concededly owned by the defendant who had none of its officers or directors and none of its other property within the State. Johnson's affidavit contains the allegation

> "That it (the defendant) carries on no business in this State *except occasionally to consign one of the steamships managed by it to parties within the State.*"

The vessel in this case was consigned to the firm of Carter, Macy & Co. of New York City. The plaintiff's affidavit stated

> "That the said steamship at said time (of the accident) was registered and still is registered in Lloyds as being owned by the Platte Steamship Company, Limited. That at said time one John Johnson, called Captain Johnson, was in charge of said vessel, and that he is the person who gave to the workmen engaged in unloading said vessel the rope which broke, and by reason of which breaking this plaintiff was injured. * * * That while said Johnson is in the State of New York deponent has known him to be in such general management, and all persons having business with the ships of the Company which come here consult with and accept orders and directions of the said Johnson and look up to him for instructions and orders.

> "That deponent has done work for the defendant at intervals for the last five years and knew the said Johnson when he was in the service of the vessel as a sailing master or captain, and before he was promoted to his present employment as manager."

Other affidavits on behalf of the defendant were submitted, and *the question raised was as to the representative character and agency of Johnson.* The Company was, of course, doing business in this country, and its vessel was here. There was, therefore, merely a disputed question of fact, which was submitted to the State Court, and necessarily the determination of that question of fact would be binding as a finding of fact upon the Federal Court on a subsequent motion to set aside the service upon the same grounds, unless leave had been granted to renew the motion; it appearing also that upon that adjudication of fact in favor of the plaintiff the Federal Court could under the decisions controlling it, render a valid, personal judgment entitled to full credit, under the Constitution, everywhere. The right of the State Court to proceed to judgment upon the facts as found by it was not in the least questioned.

On the application in this case counsel for plaintiff presented to the Circuit Court and now mentions another case not discussed on the previous applications, namely, that of Bragden vs. Perkins-Campbell Co., 82 Fed., 338. This case on examination will show the question was as to *the fact* of a certain individual being the agent of the defendant, and ACHESON, Circuit Judge, expressly states, at page 339:

> "At the defendant's instance *an issue of fact* was raised in the State Court and submitted to it for its dedetermination. The decision was against the defendant. Is the same question to be retried here on substantially the same evidence? That I think is not permissible. This is not a court of review."

That case upon its face, therefore, falls within the category including the Allmark case upon which, as a matter of fact, the Court relied. With the rule laid down in such cases we, of course, have absolutely no quarrel.

In Brooks vs. Farwell, *supra*, there was no constructive service or question of the jurisdiction of the State Court. The

defendant was an individual, and was himself served while in the State under subpœna, and the question was merely one of *irregularity in procedure*. He moved to quash the service and his motion was denied by the State Court, with leave to set up the same facts as an answer in the nature of a plea in abatement. Thereafter the case was removed (under the Act of 1875, permitting such removal after pleading). Plaintiff moved for judgment on the ground that the answer was not good pleading under the Colorado Code. The Court denied the motion, holding that the question of proper course of procedure was passed on by the State Court and could not be reviewed. No question of jurisdiction was involved.

In the head-note of Loomis vs. Carrington, 18 Fed, 97, it is expressly stated that—

> " In cases removed from a State Court the Circuit Court will not review orders made prior to the removal, *if the State Court acted within its jurisdiction.*"

There the action was begun by garnishment, and the Court had jurisdiction to issue the writ. A federal judgment was disclosed by the garnishee, and then the defendant appeared specially and moved to dismiss the writ on the ground that the federal judgment could not be reached. The motion was denied by the State Court, and then the defendant appeared generally, removed the cause, and made his motion to discharge the garnishee.

Said BROWN, J. :

> " But it was for the State Court to decide upon the question of the garnishee's liability. The affidavit in garnishment was in the ordinary form, regular upon its face, *and gave the Court jurisdiction to issue the writ.* Having thus acquired jurisdiction of the cause, it was for that Court to say whether the garnishee had disclosed any liability."

The motion was, therefore, denied.

These cases, if at all applicable to the facts in Allmark vs. Platte Steamship Company, would seem to indicate that there was merely an irregularity in the service which, *as a fact*, was made on the proper person ; and a decision that such service conformed to the practice or statute of the State, without ref-

erence to the jurisdiction of the Court under that statute, would, of course, bind the Federal Court as a declaration of a rule of practice.

Such cases are, of course, widely different from those where the judgment, if one were obtained without a general appearance, would be void *in toto*, even if the forms of the statute had been complied with.

The distinction is brought out in a striking manner in Sipe vs. Capwell, 59 Fed., 970, where the plaintiff brought suit in the Circuit Court for the Northern District of Ohio on a judgment obtained in the Rhode Island State Court upon service of process upon the defendants, non-residents, while they were in attendance upon the Rhode Island Court as parties in another suit. In affirming the judgment of the Circuit Court, sustaining a demurrer to defendant's answer (51 Fed., 667), the Circuit Court of Appeals for the Sixth Circuit, speaking through LURTON, Circuit Judge (59 Fed., 679), said:

> "*It is not a question of constructive or substituted service 'as in Pennoyer v. Neff, 95 U. S., 714. There was actual service of process.*
>
> Whether there was an abuse of the process of the Court was a question for the determination of the Court whose process is complained of *(Construction Co. v. Fitzgerald, 137 U. S., 98-105). The decision of the Rhode Island Court at most would be erroneous, and in no view of the case is the judgment void.*
>
> Having jurisdiction of the subject matter and of the person by actual service of process, it had the power to determine for itself that its process had not been abused nor its jurisdiction acquired fraudulently. Its judgment is entitled to full respect, and cannot be reviewed by the Circuit Court."

The attention of the Court is invited to recent decisions made since the decision of the first motion to remand in this cause. In Johnson vs. Computing Scale Co., 139 Fed., 339, it was held, among other things, that a defendant does not submit to the jurisdiction of a State Court so as to be estopped to remove the cause by moving in the State Court to set aside service. It appeared in that case that the defendant without appearing generally, obtained an order from one of the Judges of the Supreme Court of the State of New York where the

action was originally brought, why the service of summons should not be set aside, on the ground that the corporation sought to be served had no place of business and owned no property in the State. Pending a return of the order, the case was removed and the point was raised before District Judge RAY, sitting in the Circuit Court for the Northern District of New York, that the defendant had elected to submit to the jurisdiction of the State Court. The Circuit Court said (p. 343):

> "A defendant had a right to remove in the State Court to set aside service and did not by so doing assent or submit to the jurisdiction of the State Court."
>
> Citing Remington vs. Central Pacific R. R. Co., 198 U. S., 95.
>
> See, also,
>
> Donohue vs. Calumet, &c., Co., 94 Fed., 23.

The Remington case is of very great interest and importance in this aspect of the case at bar. In that case it appears, as stated in the opinion of this Court, that (p. 96):

> "On April 22nd the plaintiff's attorney gave twenty days additional time to the defendant in which to appear generally or specially or move to vacate the summons. On May 11th a firm of lawyers gave notice of a motion to set aside the service and also that they appeared for that purpose. An agreement was made giving the defendant time to appear after the motion was decided. The motion was not decided until September 28, 1903, when it *was denied* and an order to that effect was entered on October 2nd. The defendant's attorneys filed a notice of appeal on October 15th and next day gave notice of a motion to stay proceedings on the order to be made on October 24th. * * *
>
> "On October 26th a petition for removal was filed and the case taken into the Circuit Court."

The appeal, of course, was not passed upon by the State Court.

After the case had been brought into the Circuit Court the defendant renewed his motion to set aside the service; the Circuit Court notwithstanding the decision by the State Court raising no distinction between the matters of law and fact de-

cided by that Court, so far as the opinion of this Court shows, entertained the motion on the merits and granted it. On appeal this Court affirmed the judgment of dismissal entered by the Circuit Court and said (p. 99):

> "It is said that the decision of the State Court, although appealed from, was *res adjudicata* but it stood no higher than a similar decision made by the Circuit Court. If the case had been begun before that Court it may be that the defendant would have had no right to renew its motion. The Circuit Court would have had power to give it leave. If the Circuit Court was satisfied that it or its predecessors had made a mistake, it had power to reopen the matter. It did so and its action in that respect is not open to question here. However stringent may be the practice in refusing to consider what has been done, it is still but practice, not want of jurisdiction, that makes the rule."

This case, it seems to us, is decisive of the claim of *res judicata* interposed here by the plaintiff. The rule laid down by this Court would seem to be that in cases like the Remington case the same question raised in the State Court might be reargued in the Circuit Court on the renewal of a motion to set aside service. We have endeavored to point out the difference between a renewal of a motion made and decided on the facts, and a motion raising the purely legal question of the jurisdiction of this Court as a Federal Court. To this latter the Remington case applies, even more forcefully than to the question of a mere reargument of a motion identical with the previous motion made in the State Court.

The case at bar should be distinguished even from one where the agent or state officer had been served, and on motion in the State Court to set the service aside, a reference and trial had been had of the question of fact whether in the case of the agent he was still conducting the corporation's business within the State, or generally whether the corporation was still doing business within the State (See Bragden vs. Perkins-Campbell Co., *supra*). In presenting this question of fact to the State Court, although under a special appearance, the corporation would certainly be bound by the decision, and after that

court had determined the question against it, *it could not unless by leave*, insist on a trial of that same question again in the Federal Court. The latter court could accept as binding upon it an adjudication of fact by the State Court, under which fact the Federal Court must have held that all the elements necessary to the jurisdiction of the State Court, and to its own jurisdiction existed as matter of law. How different is this from a case where upon the undisputed fact that the corporation had ceased to do business in the State, the State Court has held that it had jurisdiction, the Federal Court *on that fact* being bound to hold as a matter of law that the State Court had *no jurisdiction*. In other words, the jurisdiction of the Federal Court to render a personal judgment is determined as matter of law by that court itself, and the views of the State Court on that subject are not material.

In this connection the case of Morris vs. Graham, 51 Fed., 53, 54, is of interest. Said the Court (C. C. S. D. of Florida):

> "The general principle that the litigant is estopped from questioning the jurisdiction of the forum which he has himself selected and chosen, although the Court may dismiss the case for lack of jurisdiction, meets us at the outset * * *. While the defendant may very properly be estopped from denying the jurisdiction of the Court which he has voluntarily selected on account of technical grounds, or irregularity, or insufficiency of service, *which has been practically cured by his appearance, the Court* is not estopped from inquiring into its jurisdiction *based upon service*, fact of parties, values, or any other matters which are material. *There is an important distinction between mere irregularities and such defects as render a service a nullity.*"

In Porter, &c. Co. vs. Baskin, 43 Fed., 323, Ross, J. (U. S. C. C. S. D. Cal.), said at page 325:

> "His (defendant's) special appearance in the State Court for the purpose of calling attention to the alleged illegality of the service was in no respect a waiver of such illegality, if it in fact existed (Harkness v. Hyde, 98 U. S., 476; Powers v. Healy, 75 Cal., 238). It is, however, contended for the plaintiff that the defendant having submitted to the State Court the question of the validity of the service upon him, and that court having held it valid, the case comes here with that adjudication

> in force, and that it must therefore be here considered that the State Court acquired jurisdiction of the defendant by the service in question, and therefore this court will take jurisdiction even though it would not have acquired such jurisdiction had the case been commenced here. In none of the cases referred to by counsel do I find that the precise point now made was decided."

The Court found that it was not necessary to decide this proposition in order to completely determine the question directly before it, but the remarks of the learned Judge are instructive on this application.

The leading case of Harkness vs. Hyde, 98 U. S., 476, brings out clearly the distinction between cases where a subsequent general appearance waives irregularity, and those cases where the application to set aside service is denied on the ground of want of jurisdiction. In the latter case the judgment is void, and that question can be raised at any time in the trial court; and after its judgment such want of jurisdiction might be considered on writ of error by the Supreme Court of the United States.

In Harkness vs. Hyde the process of the territorial court had been served on an Indian reservation outside of the local jurisdiction of the court. A motion on special appearance to dismiss the action for want of jurisdiction was denied. This was followed by a general appearance and trial on the merits. This Court reversed the judgment. Said Mr. Justice FIELD (at p. 479):

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity, nor is the objection waived when being reached it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceeding without contestation. It is only where he

pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

See, also

Goldey vs. Morning News, 156 U. S., 518–26.
So. Pacific Co. vs. Denton, 146 U. S., 202.
Donahue vs. Calumet Fire Clay Co., 94 Fed., 23.
Barrow vs. Kane, 170 U. S., 100

In the case last mentioned, Mr. Justice GRAY says (p. 111):

> "On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one State brought in a court of the United States held within another State *in which the corporation neither does business, nor has authorized any person to represent it*, service upon one of its officers or employees found within the State will not support the jurisdiction, *notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the State.*"

Although it is clear that even if in this case the motion in the Federal Court were a renewal of the motion in the State Court, and that court had decided on the irregularity merely of the service, which service, if actually made in conformity with the statute, would be deemed valid in this Court, such motion might be considered (Remington vs. Central Pacific R. B. Co., 198 U. S., 95; Miner vs. Markham, 28 Fed., 387, at 395), it is, we think, sufficiently manifest that the motion here under review raises a different question, and that question one which, because it involves the jurisdiction of the court and the validity of the judgment to be rendered, should in all justice as well as technical requirement, be passed upon by the Federal Court (See Opinion, WALLACE, C. J., in Bentlif vs. London, &c., Corp., 44 Fed., 667, 668, cited with approval in Cavanagh vs. Manhattan, etc., Co. [C. C. N. J.], 133 Fed., 819).

## IV.

**The service of summons upon the Secretary of State was properly set aside and the judgment thereon vacated because the jurisdiction of the State Court did not attach upon such service as against the Construction Company under the well-established principles laid down by the Federal Courts.**

The corporation having ceased to do business in this State, having removed its office therefrom, and having no property here, and its agent having revoked his consent, it is clear that jurisdiction did not attach under a constructive service upon the Secretary of State.

Millan vs. Mutual Reserve F. L. A., 103 Fed., 764.
St. Clair vs. Cox, 106 U. S., 350.
Conley vs. Mathieson, etc., Works, 190 U. S., 406.
Geer vs. Same, 190 U. S., 428.
Goldey vs. Morning News, 156 U. S., 518.
Wabash Western Railway vs. Brow, 164 U. S., 271.
Martin vs. New Trinidad, etc., Co., 130 Fed., 394.
Remington vs. Central Pacific R. Co., 195 U. S., 95.

And it is clear that the Federal Court in a removed case such as this, is not bound by any decision of the State Court.

Said Mr. Chief Justice FULLER, in the case of Courtney vs. Pradt, 196 U. S., 89, at p. 92:

> "When a case has been removed into the Circuit Court on the ground of diversity of citizenship, that Court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the state courts; or the sufficiency of the service of mesne process to authorize the recovery of personal judgment.
>
> Goldey vs. Morning News, 156 U. S., 518.
> Wabash Western Railway Company vs. Brow, 164 U. S., 271.
> De Lima vs. Bidwell, 182 U. S., 1.
> Conley vs. Mathieson, etc., Works, 190 U. S., 406."

Nor does the entry of a default judgment alter the quesion.

It was also held in the case of Cady vs. Associated Colonies, 119 Fed., 420, by the Circuit Court of the United States for the Northern District of California, MORROW, Circuit Judge, presiding, that the authority of a Federal Court into which a cause has been removed to determine whether the State Court, by the service made, acquired jurisdiction over the defendant, a foreign corporation, to render judgment against it, is neither derived from nor limited by the laws of the State; nor is such court concluded by the decisions of the State Court thereon.

In that case, summons was served upon the Secretary of State under the California statute providing that in the event of the failure to designate an agent to receive process, service might be made on the Secretary of State for the corporation. The action was brought in the State Court, and *judgment by default entered for failure to appear. The defendant within six months moved to vacate and set aside the default judgment, and pending that motion the case was removed.* It was held that the Circuit Court could consider the motior and the right of the State Court to enter up judgment, without being in anywise bound by the previous adjudication.

In granting the motion and quashing the service of summons, the Court (C. C. N. D. Cal.), per MORROW, Circuit Judge, said (pp. 424-5), after reviewing and quoting from the case of Goldey vs. Morning News, 156 U. S. 518:

> "These views of the Supreme Court with respect to the invalidity of a constructive service of process must of course be considered in connection with the admitted fact that the defendant was not doing business in the State of New York. *The decision is cited mainly for the purpose of showing that the Circuit Court must determine for itself the validity of a service of process in a given case, whatever may be the law of a State or its interpretation by the courts of a State under which a valid service of process may be claimed.*
>
> This brings us to the consideration of the final question in this case. The State had the right to exclude foreign corporations from doing business in the State, and where they are not excluded, their right to engage in business within the State depends upon the laws of the state granting the permission. It follows that where the state provides by law that such a corporation doing

business in the state must designate some person residing in the state upon whom the process must be served, and in default of such designation service of process may be made upon the secretary of state, *such service is valid only when the corporation is actually doing business in the state. It is not valid when the corporation has withdrawn from the state, and has ceased to do business within the state.* St. Clair v. Cox. 106 U. S., 360; Swan v. Association (C. C.), 100 Fed., 922; Friedman v. Insurance Co. (C, C.), 101 Fed., 535.

The evidence introduced in this case in support of the motion under consideration shows conclusively that the defendant had not been doing business in this State for more than two years when service of process was made upon the secretary of state. The fact that there was some claim against the defendant remaining from its former business in the State, is not sufficient. It must be engaged in transacting some substantial part of its ordinary business (U. S. vs. American Bell Telephone Co. (C. C.), 29 Fed., 37–41)."

In the leading case of Lafayette Insurance Company vs. French, 18 How., 404, 407, this Court recognizing that the state may impose conditions upon the right of a foreign corporation to do business within the State said:

> " These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, *or that principle of natural justice which forbids condemnation without opportunity for defence.*"

See the case of Penoyer vs. Neff, 95 U. S., 714, elaborating these principles.

In St. Clair vs. Cox, *supra*, this Court held that the court below correctly excluded a judgment which was offered in evidence, it not appearing therefrom that the foreign corporation defendant to such judgment, was doing business in the state at the time of the service of a writ of attachment, which the state statute of Michigan provides shall have the effect of service of summons.

Said the Court per Mr. Justice FIELD (p. 359):

> "Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statutes—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. v. French, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, *it is essential, in order to support the jurisdiction of the Court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or the finding of the court—that the corporation was engaged in business in the State.*"

It was further held in that case that where the service was authorized to be made on any "agent of such corporation within this state," that provision was not operative unless the corporation be engaged in business in the State and the agent appointed to act there. Accordingly, it was held that in the absence of such showing, service upon a man who had been agent of the company was not sufficient.

In the case of Goldey vs. Morning News, 156 U. S., 518, service in an action brought in the Supreme Court for the County of Kings was made upon the president of the defendant, a foreign corporation, while temporarily in the State of New York. The company had no place of business, officer, agent or property in the State of New York at the time. The cause was removed into the Circuit Court of the United States, for the Eastern District of New York and a motion to set aside the service of summons granted. This was affirmed by this Court in an exhaustive opinion by Mr. Justice GRAY. Although the court recognized the fact that such service had been held valid by the Court of Appeals, it refused to be bound by the decisions of the State Court, using the same language appearing in the above quotation from the case of St. Clair vs. Cox.

Said the Court further (p. 522):

> "The principle which governs the effect of judgments of one State in the courts of another State is equally applicable in the Circuit Courts of the United

States, although sitting in the State in which judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from differing governments (*Pennoyer vs. Neff*, 95 U. S., 714, 732, 733).

"For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that Court, pursuant to the acts of Congress, unless the defendant can be held by virtue *of a general appearance* or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

In the recent case of Conley vs. Mathiesen etc., Works, *supra*, suit was brought in the Supreme Court in New York County, against the foreign corporation and summons served on two members of the Board of Directors, both residents of the City of New York, the case removed to the Federal Court and a motion made to set aside the service of summons. This was granted and this Court affirmed the order of the Circuit Court notwithstanding the fact that sub-division 3 of Section 432 of the Code of Civil Procedure provides for the service of summons upon a director within the State in case no officer can be found. This service, would of course, have been held valid in the State Court. In the opinion, Mr. Justice McKenna quotes the elementary principle of jurisprudence as stated above in the case of Goldey vs. Morning News and St. Clair vs. Cox and adds (p. 411), that

"it was also held (in Goldey v. Morning News) that the defendant by filing a petition for removal did not waive defects in the service of the summons and that objection could be made to such service in the Circuit Court of the United States in the same manner as if action had been originally commenced there."

Citing also

Wabash Western Railway vs. Brow, 164 U. S., 272.

See to same effect,

Remington vs. Railway Co., 198 U. S., 92.
Clark vs. Wells, 203 U. S., 164.

In Millan vs. Mutual Reserve Fund Life Association, 103 Fed., 764, service of process at law in the State Court in a case subsequently removed to the United States Circuit Court for the Western District of Virginia, was made on the State Auditor of Public Accounts, as under the provisions of Sections 1265, 1267, c. 53, Code Va., 1887, which after providing that no insurance company which is not incorporated under the laws of this State, shall make any contract of insurance until such company shall appoint a citizen of the State its agent, upon whom process may be served, the *power of attorney nominating such agent to be filed with the state officer*, further prescribes:

> "SEC. 1267. If Agent die, etc. Another to be Appointed; When Service of Process may be on Auditor —If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of the company to appoint another agent in his place, as prescribed in the preceding section, and until such appointment is made, or during the absence of any agent of such company from the state, service of process may be upon the auditor of public accounts with like effect as upon an agent appointed by the company. The officer serving such process upon the auditor shall immediately transmit a copy thereof, by mail, to the company, and state such fact in his return."

It appeared (p. 769) "that more than a month before the issuance and service of the writ, the defendant association had withdrawn from the State of Virginia, had revoked the authority of its agent, Charles S. Stringfellow, who had been appointed to accept legal process, and of all others its agents, and had ceased to do business in the state."

The Court held that this particular insurance company was subject to the provisions of a different statute which directed the appointment of a resident agent, but made no provision for the service of process upon the corporation during the existence of a vacancy in the office of such agent or attorney, and that consequently the service was invalid. The further ground of the motion to quash, viz., that the corporation had ceased to do business in the State of Virginia at the time when the writ was issued and served upon the public officer

and upon Stringfellow was considered by the Court and sustained. Said PAUL, J., after reviewing the cases (p. 771):

> "The authorities cited fully sustain the position of the defendant in the second ground assigned for quashing the service. When the defendant ceased to do business in Virginia, and revoked the authority of its local agents, it was no longer amenable to the jurisdiction of the state courts. The right to serve process on any of its former agents or on the auditor of public accounts—even had the right to serve process on official ever existed—was terminated by the withdrawal of the company from the state."

In People vs. Commercial Alliance Insurance Co., 7 App. Div., 297, quoted in Millan vs. Mutual Reserve, etc. Association, *supra*, the Statute of Maine (Revised Statutes 1883, Chap. 49, Title 4, Sec. 89), then before the Court, provided:

> "SEC. 89. Any person having a claim against any foreign insurance company may bring a trustee action or any other appropriate suit therefor in the courts of this state. Service made on any authorized agent of said company shall be valid and binding thereon and hold it to answer to such suit; and the judgment rendered therein shall bind the company as valid in every respect, whether the defendant appear or not. If no such agent can be found such notice or service, served on the State Insurance Commissioner, who shall immediately notify said company, by mail, shall be as valid and binding as though made on its agent. Unless such judgment is paid within thirty days after demand, made upon any such agent or Commissioner, the Commissioner may, on notice and hearing of the parties, suspend the power of the company to do business within this state until it is paid. And if the company, or any agent thereof, issues any policy in the state during such suspension, said company and agent each forfeits not exceeding one hundred dollars; but any policy so issued is binding on the company in favor of the holder."

The corporation ceased to do business in the State of Maine on July 1, 1894. On July 3, 1894, a summons was served on the insurance commissioner, and on July 23, 1894, on a person claimed to be an agent of the foreign corporation.

It was held that the statute affected only foreign insurance companies doing business within the State of Maine, and that, as the corporation had ceased to do business in that state on July 1, 1894, the service was ineffective, and would not sustain a judgment entered thereon. PATTERSON, J., said:

> "When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it undoubtedly submits to the authority of the courts of that other state, and will be bound by the statutory provisions, respecting the method of such court obtaining jurisdiction over it. * * * While this Commercial Alliance Company was transacting business in the State of Maine, it was subject to the provisions of the Statute of Maine respecting the service of process in an action against it on the State Commissioner of Insurance, in the absence of any authorized agent of the company upon whom service might be made. *But that subjection does not last forever*, as the Commercial Alliance Insurance Company had ceased to do business on the first day of July, 1894, had withdrawn from the state, and had no authorized agent upon whom service might be made after that date, the substituted service on the State Commissioner would not bind it as the equivalent of personal service."

It is, of course, clear, under the principles laid down, that it is possible for the foreign corporation by proper action, to waive service of summons or the regularity thereof, but when the alleged waiver consists of an agreement that a certain state officer may receive service of process as long as any liability of the company remains outstanding in the State, it cannot be said according to the federal decisions that such waiver will necessarily be enforced where the company has actually ceased doing business in the State.

Swan vs. Association, 100 Fed., 922.
Friedman vs. Ins. Co., 101 Fed., 147.
Also see Association v. Phelps, 190 U. S., 147.

In Connecticut Mutual Ins. Co. vs. Spratley, 172 U. S., 602, a case of controlling interest, it is unequivocally held by the Court that in a suit in a State Court against a foreign corporation, where no property of the corporation is within the State, and the judgment sought is a personal one, it is material to ascertain whether the corporation is doing business

within the State; and if so, the service of process must be upon some agent in the state so far representing it that he may properly be held in law its agent to receive such process on its behalf.

In that relation it was held also that a foreign insurance company which had been doing business in a state through its agents, does not cease to do business therein when it withdraws its agent and ceases to obtain or ask for new risks or obtain new policies, while at the same time, its old policies continue in force, and the premiums thereon are paid by the policy holders to an agent residing in another state, who was once an agent in the state where the policy holders reside.

In that case the agent was temporarily in the state, but on business of the company, when served.

In Collier vs. Mutual Reserve Fund Life Assn., 119 Fed., 617, cited by plaintiff's counsel, the agreed statement of facts shows that the company, prior to the institution of suit, had revoked the appointment of G. B. Rose as its agent, under the statute, ceased to collect premiums on Arkansas policies through the local banks, and sent notice to its policy holders to pay at the home office in New York, and the policy holders had done so under direction of the defendant. Also that the defendant had a large number of outstanding policies in the State and was regularly collecting premiums therefrom, all of which policies were issued while the company was authorized to do business.

The Statute of Arkansas (Sec. 4137 Sand. & H. Dig., Ark.), under consideration, provided that

> "No insurance company not of this state, nor its agents, shall do business in this state until it has filed with the auditor of this state a written stipulation, duly authenticated by the company, agreeing that *any legal process affecting the company* served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state. And if such company should cease to maintain such agent in this state so designated, such process may thereafter be served on the auditor; *but so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked, or modified, except that a*

> *new one may be substituted*, so as to require or dispense with service at the office of said company within this state, and that such service, according to this stipulation, shall be sufficient personal service on the company." (Italics ours.)

In denying a motion to quash service of summons in the state court, the cause having been removed therefrom, the Circuit Court relied upon Conn. Mutual Ins. Co. vs. Spratley, 172 U. S., 603, in answer to the contention "that after the company ceased to do business in the state and undertook to revoke the power of its agents, no suit could be brought against the company, even if service might be had upon one of its general agents, who might be found within the territory of jurisdiction of the court." In other words, the Circuit Court in effect denied that the company had ceased to do business in the State, inasmuch as it had been held by the Supreme Court in the Spratley case that the continuation of the collection of premiums, although they were sent by the citizens of the State to the company at a foreign address, was still the doing of business in the former state.

Inasmuch, however, as a stipulation had been filed, *i. e.*, *affirmative action* taken by the company acquiescing in the provisions of the statute and in the nature of a contract with the State, the Court proceeded to hold that the company could not revoke the power of its agents or object to service upon the State Auditor (service upon both of whom had been made), and that under the circumstances the statute became part of the policy, and was moreover "*an irrevocable contract*, which the company could not avoid until it satisfied the terms of the statute, which could not be done so long as any liability to any resident of this state, entered into while the company was doing business in this state, continued."

The language used by the court in this case must be read in the light of the fact that the company had filed the stipulation, *i. e.*, *taken affirmative action* agreeing that the statute should be binding upon it, and it cannot be contended that the court held that the mere fact of doing business and having agents in the State prevented the corporation from questioning the validity of the statute after it had in fact ceased to do business there.

To so hold would be directly in the teeth of many decis-

ions both of this Court and the Circuit Courts, notably those of Conley vs. Mathieson, etc., Works, 190 U. S., 406, where the New York Code expressly provided for service upon directors within the State, and notwithstanding the fact that such service would have been held good by the state court, this Court held that the company was not bound by the statute after ceasing to do business in the State; also, Mutual Reserve, etc., Co. vs. Phelps, 190 U. S., 147, decided since the Collier case, where this Court bases its decision upon the fact that the corporation continued to do business in the State at the time of service, although it had filed its formal resolution constituting an affirmative waiver possibly, of the invalidity of constructive service; also Millan vs. Mutual Reserve, etc., Assn., 103 Fed., 764, where the company had filed no such stipulation as in the Collier case, and had as the court held, in fact ceased to do business in the State, and service upon the State Auditor and its former designated agent was set aside; also, People vs. Com. Alliance Ins. Co., 7 App., 297, where a state officer and former agent were served, but as the corporation had in fact ceased to do business in the State the Appellate Division of the New York Supreme Court held the service bad, because the subjection of a foreign corporation to the statutes of the state in which it does business "does not last forever."

Many cases have arisen involving the Mutual Reserve Life Company and cognate corporations. In Hunter vs. Mutual Reserve L. I. Co., 97 App. Div., 202 (modified in 184 N. Y., 136), and in Woodward vs. Same, 178 N. Y., 485, such service was held good under an agreement in accordance with North Carolina statutes, and in words following:

> "And said company does hereby expressly agree that any lawful process against it which may be served upon said James R. Young, Insurance Commissioner, or his successor, shall be of the same force and validity as if served upon this company, *and this authority shall continue in force and irrevocable so long as any liability of the said Company remains outstanding in the said State.*"

The Supreme Court of the United States does not, however, go to this extent, but expressly finds in the case of Mutual Reserve F. L. A. vs. Phelps, 190 U. S., 147 (pp. 156,

157), that the company was doing business within the State at the time of the service of process upon the Insurance Commissioner under a Kentucky statute similar to that of North Carolina, and under which statute the corporation had filed its consent in like manner. The Circuit Courts in the cases of Swan vs. Association, 100 Fed., 922, and Friedman vs. Ins. Co., 101 Fed., 535, have decided contrary to the New York Courts even under such statutes and stipulations.

This line of cases is clearly distinguishable from those like that at bar on the simple ground that in the former there was a formal waiver of irregularity in service and consent and agreement with the State that constructive service might be made, so long as liability continued outstanding. In the case at bar no such affirmative act appears, and the Construction Company no more consented to the service of process upon the Secretary of State, after it should have ceased doing business in this State, than the Mathieson Alkali Works agreed by doing business in this State that after ceasing the conduct of its business here its resident directors might be served. In view of the ruling of the Supreme Court in the case of Conley vs. Mathieson Alkali Works, 190 U. S., 406, it is clear that the mere doing of business in the State does not amount to a waiver of insufficient service made after the corporation has closed up its affairs there.

In Southern Pacific Co. vs. Denton, 146 U. S., 202, it was held that a state statute making an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of non-residence is not applicable to actions in a Circuit Court of the United States.

It was also held in that case that the right of a corporation to contest jurisdiction for want of the requisite citizenship of the parties is not effected by a statute of the state in which the court is held, requiring a foreign corporation before doing business in the state to file with the Secretary of State a copy of its charter with a resolution authorizing service of process to be made on any officer or agent engaged in its business within the state, and agreeing to be subject to all the provisions of the statute, one of which is that the corporation shall not remove any suit from a court of the state into the Circuit

Court of the United States; nor by doing business and appointing an agent in the state under that statute.

The case of Old Wayne Life Association vs. McDonough, 204 U. S., 8, does not affect the present situation and in no wise militates against our position in regard to it. There this Court had before it a statute of Pennsylvania requiring a written stipulation *agreeing* that legal process should be served on the Insurance Commissioner even "if such company (a foreign Insurance Company) *should cease to maintain*" its designated agent in the commonwealth. The Insurance Company in that case was a corporation of Indiana, and it issued its policy to a citizen of Pennsylvania without having first filed a stipulation required by the statute to which we have referred. Suit was brought in Pennsylvania, process served on the Insurance Commissioner, and personal judgment taken against the company. The company did some business in Pennsylvania which had no relation to the contract in question, which was held to have been made in Indiana, and this Court reversing the Supreme Court of Indiana in a suit brought upon the Pennsylvania judgment in the first mentioned State, held that under these circumstances the defendant which had no actual legal notice of the Pennsylvania suit was not brought within the jurisdiction, so that personal judgment might be rendered against it.

In the course of the opinion of this Court Mr. Justice HARLAN says (p. 21):

> "Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute (Lafayette Ins. Co. v. French, 18 How., 404; Paul v. Virginia, 8 Wall., 168; Hooper v. California, 155 U. S., 648, 653, and authorities cited; Waters-Pierce Oil Co. v. Texas, 177 U. S., 28, 45). It is equally true that if an insurance corporation of another State transacts business in Pennsylvania without complying with its provisions it will be deemed to have assented to any valid terms prescribed by that Commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers."

It will be seen that the most that can be claimed for the case just quoted is that, although not necessary to the decision, it has been intimated by this Court that if a foreign corporation coming under the effect of the statute requiring an affirmative action by way of agreement filed with the State, by its transaction of business within that State it places itself in a position where it cannot on its own behalf deny that it has complied with the statute. There was no such provision in the New York statute calling for affirmative action by the defendant in error, so that it seems to us that the reasoning of cases where stipulations are required does not apply here. The Circuit Court in this case, in concluding its opinion, clearly brought out the distinction between the two classes of statutes (Rec., p. 84) :

> "This court cannot read into the state statute a provision which clearly is not contained therein. It was unquestionably within the power of the legislature to impose restrictive conditions as a prerequisite to a defendant's right to transact business in this state, for instance, it could have provided that service of process upon the Secretary of State should be constructive service upon a defendant during the existence of any outstanding liabilities in the state, the corporation having withdrawn its business therefrom, but such is not the provision of the statute and hence it would seem that the argument of counsel for plaintiff upon that point is simply resolved into a demand for a *quid pro quo* which manifestly cannot be entertained. For the reasons stated I am constrained to hold that after the defendant withdrew its business from this state and held no property therein, the designation being revoked, the subsequent purported service upon the Secretary of State was not service upon the defendant."

This reasoning is, we think, eminently sound.

FINALLY, THE SAME RULE APPLIES TO CASES OF SERVICE UPON STATE OFFICERS APPOINTED TO ACCEPT SERVICE AND STATUTORY AGENTS SIMILARLY APPOINTED BY DESIGNATION OF THE CORPORATION AS TO CASES OF SERVICE UPON DIRECTORS, OFFICERS AND OTHER AGENTS IN GENERAL.

There is no statute here, nor is there the slightest evidence of any designation purporting to continue the power of the

agent, who, as matter of fact, was not in this case served, beyond the time within which any other agent within the state might be served, nor is there any agreement as in the Hunter and Woodward cases, in the New York courts, which provided that it was irrevocable and that service upon the state officer might be made to eternity so long as any liability might be outstanding. The designation was merely that required by the Code and the corporation laws, which, by the Code provision itself, was revocable either by the corporation directly or by the agent's revoking his consent (C. C. P., Sec. 432, sub. 2). This designation, therefore, only provided an additional agent, and service upon him was limited in the same way as upon any officer, director, public officer or other agent. This is clear from the cases already cited, where the courts make no distinction whatever as to the particular kind of agent served.

One case to which we have referred will, we think, make this perfectly clear, viz., that of Millan vs. Mutual Reserve, etc., Co., 103 Fed., 764, where the designated agent happened to be the attorney representing the defendant in its successful motion to quash the service made both on the state officer prescribed by the Virginia statute to be served, in case of the removal, etc., of the agent designated by the corporation, and also such agent himself, after the revocation of the power of attorney designating him.

We submit that it is obvious, therefore, that the mere filing of the designation or power of attorney under a statute like the one under consideration, has no such effect as a stipulation expressly providing for the continuation of the agency as long as any liability may be outstanding, but that the person so designated stands in the same position as any other agent of the corporation, and service upon him after the revocation of his authority, or service upon a public officer after the company has ceased doing business in the state, is of no greater effect that service had upon a director or other ordinary agent of the corporation.

In view of the decisions in the cases of Green vs. Chicago, Burlington & Quincy R. R. Co., 205 U. S., 530, and Wange vs. Public Service Ry. Co., 159 Fed., 189, both handed down since the rendition of the order now under review, it is submitted that aside from all other considerations and even if the service

upon the Secretary of State were good as against this Defendant, it would not authorize the beginning of a suit elsewhere than in the district in which the public office of the Secretary of State is located, namely, the Northern District of New York, and therefore the motion should have been granted on that ground.

The rule is distinctly laid down by this Court, that service upon a non-resident corporation can only be made within the district in which its agent is. This was applied in Wange vs. Public Service Ry. Co., *supra*, to the case where Plaintiff, a resident of Kings County, New York (in the Eastern District of New York), brought an action in the Supreme Court of New York and served defendant's agent in the Borough of Manhattan, County of New York (in the Southern District of New York), the case was removed to the Circuit Court for the Eastern District of New York and a motion to set aside service of summons was granted. As above stated, these decisions had not been handed down when the argument of the instant case was had, so the point was not raised in the Circuit Court; but as they relate to the jurisdiction of the Court, it is suggested that they may, even at this stage, be called to the attention of this Court.

WE SUBMIT THEREFORE upon the grounds stated, that the order of the Circuit Court vacating the default judgment and setting aside the service of process is well founded in law and should be affirmed.

C. WALTER ARTZ,
For Defendant in Error.

## LATHROP, SHEA & HENWOOD COMPANY *v.* INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

No. 2. Argued October 22, 1909.—Decided December 6, 1909.

Where plaintiff in good faith insists on the joint liability of all the defendants until the close of the trial, the dismissal of the complaint on the merits as to the defendants who are citizens of plaintiff's State does not operate to make the cause then removable as to non-resident defendants and to prevent the plaintiff from taking a verdict against the defendants who might have removed the cause had they been sued alone, or if there had originally been a separable controversy as to them.

THE facts, which involve the validity of the removal of a cause to the Federal court, are stated in the opinion.

*Mr. Clarence M. Bushnell* for plaintiff in error.

*Mr. C. Walter Artz* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The parties were respectively plaintiff and defendant in the court below, and we shall so designate them.

The plaintiff brought suit against the defendant and the Pittsburg, Shawmont and Northern Railroad Company in the Supreme Court of Erie County, New York, for the sum

of $43,038.88, upon a contract entered into between the defendant, the Interior Construction and Improvement Company, and the plaintiff, by which the Construction Company agreed to construct certain portions in Pennsylvania and New York of the line of the railroad company, and for materials and the use of certain articles by the railroad. It is alleged in the petition of the plaintiff that the railroad company was organized by the consolidation of other railroad companies, and for the purpose of carrying out the plans of such consolidation undertook the construction of a railroad from certain points in Pennsylvania to the village of Angelica in the State of New York. That in pursuance of this purpose the railroad company entered into a contract with the Construction Company, and in payment for the construction of the railroad agreed to issue and did issue to the company its stocks and bonds, which were largely in excess of cost of construction. That the Construction Company was organized solely for the purpose of building the railroad and to secure to the promoters and organizers thereof the profits to be made by the construction of the railroad and the manipulation of securities. That the officers, directors and owners of the majority of the capital stock of the railroad had like relation to the Construction Company and the management of the latter was controlled by them. And it is averred that the Construction Company was the agent and representative of the railroad company, and that the latter became and is responsible and liable for the acts and obligations of the Construction Company. Due performance by plaintiff of its contract is alleged.

It is further alleged that the railroad company is a New York corporation and the Construction Company is a New Jersey corporation.

There was personal service of the summons on the railroad company on the twenty-fourth of October, 1904. That company appeared and answered. The service upon the Construction Company was made on the sixteenth of November, 1904, by serving the summons on the secretary of state

of the State of New York. The Construction Company made a motion to set aside the service of summons on the ground that it was irregular and void. The company made no other appearance. The motion was denied, and appeal was taken to the Appellate Division of the court. That court affirmed the ruling, and denied leave to appeal to the Court of Appeals. The Construction Company's time to answer was extended to February 6, 1905, and, upon motion of the company, the case was removed to the United States Circuit Court on the ground of a separable controversy, but was subsequently remanded upon motion of the plaintiff. The motion to set aside the service of summons was denied. *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 135 Fed. Rep. 619. Upon the return of the case to the state court, a motion was made by the Construction Company to extend its time to appear and answer in the action until twenty days after the determination of the motion then pending, made in behalf of the railroad company, to compel the plaintiff to elect which defendant it would proceed against, to the exclusion of the other. The motion was denied, also that made by the railroad company. The referee to whom the issues raised by the railroad company had been referred, to hear and determine, reported dismissing the complaint as to that company, and judgment thereon was entered on the twenty-sixth of October, 1905. The judgment was affirmed by the Appellate Division of the Supreme Court. But, pending the appeal, upon motion of the Construction Company the case was removed to the Circuit Court, but that court remanded the case, saying that "until the determination of the appeal by the co-defendant, in the absence of fraud or improper joinder of defendants for the purpose of interfering with or obstructing the Construction Company's right of removal, it is not thought that a separable controversy exists." *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 143 Fed. Rep. 687.

On the twenty-third of September, 1905, an affidavit of the

default of the Construction Company having been filed, an order was made in the Supreme Court, reciting the fact, and the facts showing such default, and appointing a referee "to take proofs of the cause of action set forth in the plaintiff's complaint." The referee reported that there was due plaintiff the sum of $47,323.91. The report was confirmed and judgment entered for that amount.

Subsequently, the Appellate Division having sustained the judgment dismissing the action as to the railroad company, the case was again, on the motion of the company, removed to the Circuit Court and a motion made in that court to set aside the service of summons on the Construction Company and to vacate the judgment. Concurrently with that motion plaintiff moved to remand the case to the state court. The motion of the Construction Company was granted and the action dismissed for want of jurisdiction over the company. *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 150 Fed. Rep. 666.

The motion was granted on the ground that the facts showed that the company had ceased to do business in the State and held no property therein.

It will be seen that a question of jurisdiction alone is presented, the Circuit Court certifying "that no evidence was introduced upon the hearing of the motion, the issues being:

"I. Whether this court had obtained jurisdiction over this defendant by the service of a summons upon the secretary of state of the State of New York as provided by section 16 of the General Corporation Law of said State of New York.

"II. Whether the proceedings in and the decisions of the courts of the State of New York construing said corporation law were controlling upon this court.

"III. Whether the proceedings taken by said defendant in said state court are *res adjudicata* upon defendant."

But there is a question of jurisdiction paramount to that passed on by the Circuit Court. It will be observed that the action against the railroad company was not dismissed by

plaintiff, but, against its contention, by the Supreme Court of the State, whose judgment was affirmed, also against its contention, by the Appellate Division of that court. This did not take jurisdiction from the state court to proceed against the Construction Company nor make the judgment against it invalid.

It was held in *Powers* v. *C. & O. Ry.*, 169 U. S. 92, that a case may become removable after the time prescribed by statute, upon the ground of a separate controversy upon the subsequent discontinuance of the action by the plaintiff against the defendants, citizens of the same State with the plaintiff. In *Whitcomb* v. *Smithson*, 175 U. S. 635, 637, the *Powers case* was commented on, and a different effect was ascribed to a ruling of the court dismissing the action as to one of the defendants than to a discontinuance by the voluntary act of the plaintiff. The action was against Whitcomb and another who were receivers of the Wisconsin Central Company and the Chicago Great Western Railway Company for personal injuries received by Smithson while serving the Chicago Great Western Railway Company as a locomotive fireman in a collision between the locomotive on which he was at work and another locomotive operated by the receivers appointed by United States Circuit Court. The case came to trial, and at the close of the testimony counsel for the Chicago Great Western Railway Company moved that the jury be "instructed to return a verdict in behalf of that defendant," which motion the court granted. An application was then made by the receivers to remove the case to the Circuit Court of the United States, which was denied. The court instructed the jury to return a verdict for the railway company, which was done, and thereupon the case went to the jury, who returned a verdict against the receivers, upon which judgment was entered. The judgment was affirmed by the Supreme Court of Minnesota, to which a writ of error was issued from this court. Passing on motions to dismiss or affirm and answering the contention of the receivers that they

acquired the right of removal as though they were the sole defendants, when the court directed a verdict in favor of the railway company, this court said by the Chief Justice: "This might have been so if when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all of the defendants. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*. . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them."

The *Whitcomb case* and the *Powers case* are commented on and impliedly approved in *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131, 138. And again in *Kansas City Suburban Belt Ry. Co.* v. *Herman*, 187 U. S. 63; *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364, 372. See also *Alabama Great Southern Ry.* v. *Thompson*, 200 U. S. 206.

It follows from these views that the order of the Circuit Court setting aside the service of the summons on the Construction Company and vacating the judgment against it and dismissing the action must be

*Reversed and the cause remanded, with directions to grant the motion of plaintiff to remand the case to the Supreme Court of the State of New York. So ordered.*

END OF CASE